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Comments

THE ATTRACTIVE NUISANCE DOCTRINE IN LOUISIANA

In the English feudal days a man's home could in fact be his castle and not even the King could enter without permission. The only duty owed by a landowner to unauthorized persons on his land was that of not intentionally injuring them after he discovered them.[1] However, as social and economic adjustments were made, a feeling arose that such a rule was too harsh, that a tres-

1. Peaslee, Duty to Seen Trespassers (1914) 27 Harv. L. Rev. 403; Prosser, A Handbook on the Law of Torts (1941) 613.

passer was not a criminal whom the law would not protect. As a result, inroads were made on this immunity of the landowner.[2] The trend began in the early English spring-gun[3] and baited-trap cases,[4] in which the possessor of land was liable for injury that was deliberately planned in anticipation of a trespass. Later, landowners were required to use reasonable care toward trespassers actually discovered upon their lands.[5] But the most extensive and controversial restriction of the landowner's immunity has taken place in situations in which the trespassers have been children.[6]

The leading American case of *Sioux City Railway Company v. Stout*,[7] in 1873, involved the maintenance of an unlocked turntable on a railroad right of way. A young child played with and was injured by the turntable. In allowing recovery, the court assumed that the railroad owed a duty of care toward the trespassing child. It based the railroad's liability upon the foreseeability of injury to the child.

Most American courts were unwilling, however, to impose on the landowner the broad duty to use reasonable care toward trespassing children.[8] It was assumed that a sympathetic jury could not be depended upon to administer such situations with fairness to the landowner. In their search for some approach whereby the judges could maintain more control over such disputes, the courts evolved the "attractive nuisance" doctrine.[9]

The doctrine exists in almost as many variations as there are courts announcing it. But, in general, the fact that the presence

2. A good review of this development is found in Eldredge, Tort Liability to Trespassers (1937) 12 Temp. L. Q. 32, and Prosser, op. cit. supra note 1, at 609-625.

3. Bird v. Holbrook, 4 Bing. 628, 130 Eng. Reprint 911 (C.P. 1828).

4. Townsend v. Wathen, 9 East. 277, 103 Eng. Reprint 579 (K.B. 1808).

5. Restatement, Torts (1934) § 336; Green, Landowner v. Intruder (1923) 21 Mich. L. Rev. 495; Peaslee, supra note 1.

6. Some of the leading articles on the subject are Bohlen, The Duty of a Landowner Towards Those Entering His Premises of Their Own Right (1921) 69 U. of Pa. L. Rev. 340, 347-350; Eldredge, supra note 2; Green, Landowner v. Intruder (1923) 21 Mich. L. Rev. 495; Green, Landowners' Responsibility to Children (1948) 27 Tex. L. Rev. 1; Hudson, The Turntable Cases in the Federal Courts (1923) 36 Harv. L. Rev. 826; Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 434. See also Prosser, op. cit. supra note 1, at 617-625; Restatement, Torts (1934) § 339; Note (1926) 14 Ky. L.J. 176; Note (1928) 7 Tex. L. Rev. 173; Note (1934) 34 Col. L. Rev. 782.

7. 84 U. S. 657, 21 L. Ed. 745 (1873).

8. Green, Landowner v. Intruder (1923) 21 Mich. L. Rev. 495, 507.

9. See articles cited in note 6, supra, and Restatement, Torts (1934) § 339; Notes (1925) 36 A.L.R. 34, (1925) 39 A.L.R. 486, (1926) 45 A.L.R. 982, (1928) 53 A.L.R. 1344, (1929) 60 A.L.R. 1444, (1944) 152 A.L.R. 1263.

of young children can be expected in certain places imposes a duty on the property owner to exercise due care for their safety with respect to certain artificial conditions or dangerous activities on the land.[10]

The courts which adopt the doctrine adhere to the old common law immunity of the landowner to trespassers. But they are prepared to admit that under certain circumstances the infant trespasser may be elevated to the status of a licensee[11] or invitee[12] through the use of the legal fictions of "implied invitations," "implied licenses," "allurements," "enticements," or "tacit permission."[13] The court decides, as a matter of law, whether such implied permission exists and, therefore, whether the doctrine is applicable.

Even these measures of jury control have not satisfied all courts, and additional restraints have been imposed. For example, some courts have limited the doctrine to "artificial condition(s) . . . inherently dangerous to children," "hidden dangers," or "concealed traps,"[14] or have restricted the attractive nuisance doctrine to instances in which the child was attracted to the dangerous object *before* it became a trespasser.[15]

Several courts, principally in industrial states, have entirely rejected the doctrine.[16] They find no greater duty owed by the

10. Note (1939) 14 Ind. L.J. 376 and cases cited therein.

11. Toward the licensee, the occupier of land has no duty to see that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the premises, which is not apparent to the visitor, but which is known or should be known to the occupier. Robert Addie & Sons (Colleries) Limited v. Dumbreck [1929] A.C. 358; Prosser, op. cit. supra note 1, at 625; Restatement, Torts (1934) § 342.

12. A landowner has a duty to an invitee of taking reasonable care that the premises are safe or of warning the visitor of the dangerous activities or conditions of which the occupier knows or reasonably should know. Robert Addie & Sons (Colleries) Limited v. Dumbreck [1929] A.C. 358; Prosser, op. cit. supra note 1, at 635; Restatement, Torts (1934) § 343.

13. United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299, 66 L. Ed. 615, 36 A.L.R. 28 (1922); Keefe v. Milwaukee & St. P. Ry., 21 Minn. 207, 18 Am. Rep. 393 (1875); Prosser, op. cit. supra note 1, at 618 and cases cited therein; Bohlen, supra note 6, at 348, n. 16; Note (1934) 29 Ill. L. Rev. 253. See also Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858, 35 L.R.A. (N.S.) 440, Ann. Cas. 1913A 1025 (1911) for a good discussion of these legal theories.

14. 45 C.J. 763, 765, 771; 20 R.C.L. 86, § 76.

15. United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299, 66 L.Ed. 615, 36 A.L.R. 28 (1921); Salt River Valley Water Users' Ass'n. v. Compton, 39 Ariz. 491, 8 P. (2d) 249 (1932); same case, 40 Ariz. 282, 11 P. (2d) 839 (1932), noted in (1932) 27 Ill. L. Rev. 459; Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P.(2d) 369 (1932), noted in (1932) 31 Mich. L. Rev. 439. See also Notes (1922) 36 Harv. L. Rev. 113, 350, (1923) 17 Ill. L. Rev. 612, (1929) 24 Ill. L. Rev. 248, and articles cited in note 6, supra.

16. See Prosser, op. cit. supra note 1, at 620, and cases cited therein.

landowner to trespassing children than to adults in the same situation.

In the first Louisiana case involving injury to a trespassing child,[17] the supreme court adopted the broad language of the *Stout* case.[18] However, the Louisiana courts soon reverted to the use of all the legal fictions currently employed to limit the duty owed infant intruders by the landowners.[19]

The language of the Louisiana cases imposing or denying recovery under the attractive nuisance doctrine is not always consistent. But throughout the cases involving trespasses upon land[20] can be seen certain factors, circumstances, and considera-

17. Reary v. Louisville, N. O. & Tex. Ry., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497 (1888).

18. 84 U. S. 657, 21 L.Ed. 745 (1873).

19. For example, in O'Connor v. Illinois Central Ry., 44 La. Ann. 339, 10 So. 678 (1892), the condition of defendant's fence did not operate as an "invitation or procurement, express or implied"; in Savage v. Tremont Lumber Co., 3 La. App. 704 (1926), a railroad flat car did not amount to a "trap"; in Peters v. Town of Ruston, 167 So. 491 (La. App. 1936), a pond was not "peculiarly alluring" to children; in McDonald v. Shreveport Rys., 174 La. 1023, 142 So. 252 (1932), electrical wires were not an "invitation" to children to use them; and in the dictum in Schultz v. Kinabrew, 177 So. 450 (La. App. 1937), the court said that the "attractiveness amounts to an implied invitation to such children."

The attractive nuisance doctrine was developed because judges feared that juries would be too lenient in allowing recovery against deep-pocketed landowners under negligence principles. Query: In view of the virtual non-use of juries in civil cases in Louisiana courts and the right of review of the facts by appellate courts in all civil cases, would it not be more expedient to base the liability of the landowner toward trespassing children on simple negligence theories, as in the *Stout* case? See Green, Landowner v. Intruder (1923) 21 Mich. L. Rev. 495, and Green, Landowners' Responsibility to Children (1948) 27 Tex. L. Rev. 1, for a compelling argument, which has special application in Louisiana, for a return to the doctrine of the *Stout* case. Also, note the language of the Louisiana Supreme Court in the recent case of Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So. (2d) 791 (1949). Although the attractive nuisance doctrine was applied in allowing recovery, the legal fictions discussed above seemingly were not relied on.

20. This comment is restricted to cases involving trespasses upon land. At times, the Louisiana courts, as have the courts of many other jurisdictions, have extended the attractive nuisance doctrine to dangerous objects and conditions in public streets and places, by analogy to cases involving trespasses upon land. The doctrine was developed to overcome the traditional immunity that the English landowners enjoyed against unauthorized intruders without placing the landowner's duty on the basis of negligence. It is doubtful that such immunity was ever extended to owners of chattels left in public places (Pollock, Law of Torts [Landon's 14 ed., 1939] 280). It would appear that these cases could be handled more easily under simple negligence principles, with the meddling of the child as an element of contributory negligence. Compare the leading English case of Lynch v. Nurdin, 1 Q.B. 29, 41 E.C.L. 422, 113 Eng. Reprint 1041, 1 Ad. & E. (N.S.) 29 (1841), with the leading Louisiana case of Westerfield v. Levis Brothers, 43 La. Ann. 63, 9 So. 52 (1891), both involving vehicles left on public streets, and in both of which a duty to the meddling child was assumed. In each case, the principle question was the child's contributory negligence. In Lopes v. Sahugue, 114 La. 1004, 38 So. 810 (1905) (delivery cart); Palermo v. Orleans Ice Mfg.

tions which have influenced the courts to impose or deny liability under the doctrine. Perhaps in no case can it be said that any single factor was controlling. The problem has been to strike a balance between those considerations that suggest recovery and those that do not. The cases indicate that recovery is conditioned upon the presence of the following factors:

(1) *The danger must be great and one not usually encountered in the ordinary uses of land.*

Recovery has never been allowed under the attractive nuisance doctrine for injuries caused by domestic uses of land or by the natural condition of the land. This limitation is explicit in the cases involving drownings in private ponds. In two cases of this type, the court held that the doctrine does not apply to a pond "unless there is some unusual condition or *artificial feature* other than the mere water and its location. . . ."[21] Liability would impose too heavy a burden on the landowner for the mere ownership of land and for the activities incidental to such ownership.

Liability has not resulted from ordinary activities having a reasonable relation to the business conducted upon the land. Recovery was denied in cases involving railroad dump cars in a storage yard,[22] flat cars on a siding,[23] a turntable[24] and cross-ties[25]

Co., 130 La. 833, 58 So. 589 (1912) (hot water and steam in a gutter); Smith v. City of Baton Rouge, 166 La. 472, 117 So. 559 (1928) (street excavation); Fredericks v. Illinois Cent. Ry., 46 La. Ann. 1180, 15 So. 413 (1894) (culvert over ditch between street and sidewalk); Lynch v. Knoop, 118 La. 611, 43 So. 252 (1906) (pile of lumber on public landing); and Blum v. Weatherford & Cary Brothers, 121 La. 298, 46 So. 317 (1908) (stringers across a public canal), the attractive nuisance doctrine was not applied as such. These cases seemingly were decided on simple negligence principles. The considerations influencing the court in its decisions, however, were the same as those involved in the application of the attractive nuisance doctrine to land cases. Compare the above cases with Bordelon v. City of Shreveport, 5 La. App. 201 (1926); and Tabary v. New Orleans Public Service Comm., 142 So. 800 (La. App. 1932), both involving ditch-digging machines left in a public street, in which the decisions were reached on the basis of the attractive nuisance doctrine. In the latter case, there was no trespass or meddling by the injured child on either land or chattels.

The language of the Louisiana Supreme Court in the recent case of Saxton v. Plum Orchards Co., Inc., 215 La. 378, 40 So. (2d) 791 (1949), to the effect that one of the requirements of the doctrine is "that there was reason to anticipate the presence of such children, either because of some attraction on the premises, or *because the danger was in some place where children had a right to be,*" indicates that the attractive nuisance doctrine might not be restricted to trespasses upon land, but may be extended by the court to technical trespasses upon chattels in public places.

21. McKenna v. City of Shreveport, 133 So. 524, 526 (La. App. 1931); Peters v. Town of Ruston, 167 So. 491, 493 (La. App. 1936).

22. O'Connor v. Illinois Cent. Ry., 44 La. Ann. 339, 10 So. 678 (1892).

23. Savage v. Tremont Lumber Co., 3 La. App. 704 (1926).

24. Hendricks v. Kansas City Southern Ry., 142 La. 499, 77 So. 130 (1917).

25. Buchanan v. Chicago, R. I. & P. Ry., 119 So. 703 (La. App. 1929).

on railroad rights of way, an elevator in an office building,[26] a pile of saw-logs on property belonging to a saw-mill,[27] an electrical sub-station in a residential area,[28] and a pond in a city park.[29] Liability has been imposed, however, in two cases, one involving a pond[30] and one leaking gas,[31] in which the injuring agencies were not contributing to any economic activity on the land.

In two cases involving ponds, *McKenna v. City of Shreveport*[32] and *Peters v. Town of Ruston*,[33] the courts emphasized the necessity that the risk involved be great, by insisting that the peril be unknown, concealed, or hidden. The analogy here to the liability imposed for injuries caused licensees by "traps"[34] is obvious. But it is believed that the court stressed the element of hidden peril in order to preclude recovery when the injured child actually appreciated the danger, and was not purporting to lay down a literal requirement of concealment. In both cases, the court pointed out that the danger of drowning is apparent to children of even the tenderest years.

In order to emphasize the degree of danger that must be created in order to impose liability under the attractive nuisance doctrine, the Louisiana courts have talked in terms of conditions which are "peculiarly dangerous to children" or "per se of a dangerous nature with respect to children of tender years,"[35] or "extremely dangerous."[36] But the cases indicate that the more important consideration is the use to which the injuring instrumentality is put by the property owner. The unusual nature of the activity and its apparent lack of usefulness are strong factors favoring recovery.

(2) *There must be a strong reason to anticipate the presence of children and their probable injury.*

The Louisiana courts require a high degree of attractiveness and hence an unusual likelihood of trespass by children. They seem to insist (1) that the injuring instrumentality must be of such a nature that it will attract children and (2) that it must, in fact, attract the injured child to it.

26. Marquette v. Cangelosi, 148 So. 88 (La. App. 1933).
27. Peters v. Pierce, 146 La. 902, 84 So. 198 (1920).
28. McDonald v. Shreveport Rys., 174 La. 1023, 142 So. 252 (1932).
29. Peters v. Town of Ruston, 167 So. 491 (La. App. 1936).
30. Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.(2d) 791 (1949).
31. Jackson v. Texas Company, 143 La. 21, 78 So. 137 (1918).
32. 133 So. 524 (La. App. 1931).
33. 167 So. 491 (La. App. 1936).
34. See note 11, supra.
35. See note 21, supra.
36. Jackson v. Texas Company, 143 La. 21, 78 So. 137 (1918).

In *Tomlinson v. Vicksburg, Shreveport & Pacific Railway Company*,[37] two infant children went upon defendant's land and played upon a pile of cross ties. One child dislodged a cross tie, causing it to fall upon the other. The court pointed out the unusual degree of attractiveness required in order for the attractive nuisance doctrine to be applicable:

> "Almost any object that a little child can climb or play upon is tempting to him, and almost any such object that is not intended for a child to climb or play upon is dangerous for him to climb or play upon. . . . The doctrine of responsibility for having on one's premises an inviting or attractive danger to children must be . . . confined to cases where the dangerous agency is so obviously tempting to children that the owner is guilty of negligence for failing to observe and guard against the temptation and danger."[38]

The *Peters* case[39] held that the condition or agency must be "unusually" or "peculiarly" attractive and alluring to children in order for the attractive nuisance doctrine to apply.

The nearness of the dangerous instrumentality to a public place increases the chance that children will come into contact with it, thus increasing the degree of care required to guard against injury. In *Jackson v. Texas Co.*,[40] a six-year-old girl was burned when her playmate lighted a match over a leak in defendant's gas pipe line. The leak had existed for several months prior to the accident and had been ignited frequently by children in order to amuse themselves. The court commented that "nothing more attractive to children could have been devised." In allowing recovery, the court laid particular emphasis on the fact that the flames from the leak were located six to ten feet from a public path.[41]

Saxton v. Plum Orchards[42] involved the drowning of a four-

37. 143 La. 641, 79 So. 174 (1918).

38. The application of this test in the subsequent case of Peters v. Pierce, 146 La. 902, 84 So. 198 (1920) (pile of saw logs) and in Marquette v. Cangelosi, 148 So. 88 (La. App. 1933) (office building elevator), resulted in a denial of recovery in both instances.

39. Peters v. Town of Ruston, 167 So. 491 (La. App. 1936).

40. 143 La. 21, 78 So. 137 (1918).

41. An alternative basis for recovery in this case could have been the duty that a landowner owes to users of adjacent highways. This duty has been extended to protect children who tend to stray from the public road. Restatement, Torts (1934) § 368; Prosser, op. cit. supra note 1, at 603. The spot at which the leak occurred was as much open to the public as was the path and "was commonly believed to be, and used as, had the appearance of, and bore no signs to indicate it was not, a public highway."

42. 215 La. 378, 40 So.(2d) 791 (1949).

year-old girl in an artificial pond that had outlived its usefulness in the residential area in which it was located. The supreme court reversed the decisions of the lower courts and gave judgment for plaintiff, stressing, inter alia, that the dangerous pond was readily accessible and clearly visible from the nearby streets and dwellings.

The court in *Fincher v. Chicago, Rock Island & Pacific Railway Company*[43] held that the attractive nuisance doctrine would not apply to a pond unless it were situated so as to attract children from the safe place where they have a right to be and are likely to be and induce them to enter the premises where the attraction is in order to meddle or play with it. However, it is believed that the court was only applying a strict test of foreseeability. The court appeared to be saying that unless the dangerous condition is within view of a public place, where children usually are, the possibility of its causing injury to such children is not great enough to create a duty in the landowner to protect against the danger.[44] The court noted that the danger of a drowning had never occurred to anyone, although the pool, a part of the drainage system of the town of Jonesboro, had existed for a long time.

In view of the fact that the cases after the *Fincher* case have all involved conditions apparently visible from a position off the premises,[45] the supreme court has not had another occasion to apply or reject this requirement. However, the language of the court in the *Saxton* case, in discussing the *Fincher* case, indicates that it may be re-applied in an appropriate case. If the supreme

43. 143 La. 164, 78 So. 433 (1918).

44. It is noteworthy that this severe limitation, the same one as applied later by the United States Supreme Court in United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 42 S. Ct. 299, 66 L.Ed. 615, 36 A.L.R. 28 (1921), was applied in a case in which the injuring condition was a body of water. The Louisiana courts have been extremely reluctant to allow recovery in such cases, and have emphasized the practical necessity for canals, ponds, and drainage ditches, their widespread use in Louisiana, the purpose they serve, and the burden that would be placed on landowners if their maintenance were to constitute a negligence.

45. Tomlinson v. Vicksburg, S. & P. Ry., 143 La. 641, 79 So. 174 (1918) (cross-ties stacked "by the side of a . . . public highway"); Peters v. Pierce, 146 La. 902, 84 So. 198 (1920) (saw-logs piled "adjacent to the road"); Savage v. Tremont Lumber Co., 3 La. App. 704 (1926) (flat cars near a public crossing); Buchanan v. Chicago, R.I. & P. Ry., 119 So. 703 (La. App. 1929) (cross-ties near a path on a railroad right of way); McKenna v. City of Shreveport, 133 So. 524 (La. App. 1931) (pond of water on city lot); McDonald v. Shreveport Rys., 174 La. 1023, 142 So. 252 (1932) (electrical substation on back of empty city lot); Marquette v. Cangelosi, 148 So. 88 (La. App. 1933) (elevator visible from the street); Peters v. Town of Ruston, 167 So. 491 (La. App. 1936) (pond visible from public road); Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.(2d) 791 (1949) (pond visible from public roads).

court does follow this rule literally and require that the injuring object must attract the child from a place not on the premises, it will restrict still further the application of the attractive nuisance doctrine in this state.

In two cases,[46] recovery was denied specifically on the ground that the injuring agency had not, in fact, attracted the child to it. In one, involving a railroad turntable,[47] the danger was said to be negligible. In the other,[48] a boy touched defendant's power line when he accidentally fell out of a tree which had no connection with the electric wires. This view is narrower than that of most American jurisdictions, in which the "attraction" element is used merely as a judicial method of controlling the application of the attractive nuisance doctrine.

(3) *The usefulness of the injuring activity or condition must be relatively small as compared with the danger created toward young children by its maintenance upon privately owned land.*

Railroad property of all kinds is naturally attractive and dangerous to children. As a result, cases which involve trespasses by children on such property[49] have been a fertile field for the urging of the attractive nuisance doctrine. Except in one questionable decision,[50] the Louisiana courts have consistently held the attractive nuisance doctrine to be inapplicable to railroad

46. Hendricks v. Kansas City Southern Ry., 142 La. 499, 77 So. 130 (1917); Fuscia v. Central Light and Power Co., 2 La. App. 195 (1925).

47. Hendricks v. Kansas City Southern Ry., 142 La. 499, 77 So. 130 (1917).

48. Fuscia v. Central Light & Power Co., 2 La. App. 195 (1925).

49. Reary v. The Louisville, N.O. & Tex. Ry., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497 (1888); O'Connor v. Illinois Cent. Ry., 44 La. Ann. 339, 10 So. 678 (1892); Spizale v. Louisiana Ry. & Nav. Co., 128 La. 187, 54 So. 714 (1911); Hendricks v. Kansas City So. Ry., 142 La. 499, 77 So. 130 (1917); Fincher v. Chicago, R.I. & P. Ry., 143 La. 164, 78 So. 433 (1918); Tomlinson v. Vicksburg, S. & P. Ry., 143 La. 641, 79 So. 174 (1918); Savage v. Tremont Lumber Co., 3 La. App. 704 (1926); Buchanan v. Chicago, R.I. & P. Ry., 119 So. 703 (La. App. 1929).

50. Friedman's Estate v. Texas & Pac. Ry., 209 La. 540, 25 So.(2d) 88, 163 A.L.R. 1228 (1945), in which cattle wandered onto a non-fenced railroad right of way and trestle and were struck by a train. The trestle and approaching train were treated as "something in the nature of a trap." The attractive nuisance doctrine was held applicable, in spite of the fact that La. Acts 110, § 3 and 70, § 1, of 1886 [La. R.S. (1950) 45:504, 45:503] imposed upon the non-fencing railroads the duty of using reasonable care toward trespassing cattle. Here was established, by legislative flat, the same duty of care that the courts established through the use of the attractive nuisance doctrine. See Malone, The Work of the Louisiana Supreme Court for the 1945-1946 Term (1947) 7 LOUISIANA LAW REVIEW 249, and Note (1946) 20 Tulane L. Rev. 612 for criticisms of this needless application of the attractive nuisance doctrine.

property. The courts have reiterated that railroads owe to children no greater duty of care than is owed to adults.[51]

This careful restriction on the imposition of liability is supported by strong practical and economic considerations. Imposing liability under the doctrine would subject railroads to the prohibitive cost of attempting the almost impossible task of making hundreds of miles of tracks, switch-yards, and other rights of way inaccessible to small children. The inability of the railroads to render vital transport service without the use of such equipment may well justify the cost to society resulting from the operation of equipment admittedly attractive and dangerous to children.

The Louisiana Supreme Court refused to apply the attractive nuisance doctrine to electrical equipment in the one case in which the point was squarely presented.[52] The court declared that electrical equipment operated in the customary manner on private property is not considered as an attractive nuisance. Probably the most important factor in the case was that extensive precautions had been taken to protect against the danger. However, the valuable service which such equipment renders and the absolute necessity of maintaining it in highly populated districts, in spite of its obvious danger to children, were strong factors influencing the court in its decision.

In marked contrast are the cases in which recovery has been allowed under the doctrine. The escaping gas in the *Jackson* case,[53] which continued over a period of months and created an extremely dangerous condition in a semi-public place, had no usefulness at all. The dangerous pool in the *Saxton* case,[54] located in the heart of a residential subdivision, had long since become useless as a drainage ditch and was "serving no useful purpose."

(4) *The burden on the landowner to guard against the danger or to remove the source of the danger must not be too great.*

The extent of the precautions required depends in a large measure on the benefit resulting to the community from the dangerous agency and the effect that a burden of protection would have on a socially desirable business carried on by the landowner.

51. See Note (1943) 5 LOUISIANA LAW REVIEW 342, distinguishing the duty owed trespassing infants from that owed habitual trespassers over a limited area of a railroad right of way.

52. McDonald v. Shreveport Rys., 174 La. 1023, 142 So. 252 (1932).

53. 143 La. 164, 78 So. 433 (1918).

54. 215 La. 378, 40 So.(2d) 791 (1949).

A railroad company that repeatedly patched its fence around a storage yard was held to have exercised due care.[55] Where the danger from a turntable on a railroad right of way was negligible, the railroad owed no duty to the public to fence its right of way or to warn the public away from the turntable.[56] Protective measures which included warning signs, a seven-foot fence topped with barbed wire, locked gates, and high power lines eighteen feet above the ground were held to be sufficient protection for electrical equipment within the enclosure.[57]

The courts have repeatedly emphasized the inability of the landowner to guard against the danger of drowning without considerable expense:

> "To hold an owner of real estate, upon which there is a body of water, liable for accidents that may happen to children while trespassing thereon, would be to place upon them an unfair burden. The danger is one which cannot be guarded against without considerable expense or inconvenience. . . ."[58]

This consideration has led most jurisdictions to adopt the rule that ponds are not attractive nuisances.[59] Because of the topography of Louisiana and the resulting usefulness of the many drainage ditches and canals throughout the state, the Louisiana courts have been very reluctant to impose a burden of protection on the landowner. The risk is an overspreading one which must be absorbed by society as a whole. But the supreme court has refused to apply the majority view as an unvarying rule.[60] In the recent *Saxton* case[61] recovery was allowed for the drowning of a child in a pond that was serving no useful purpose whatever. The defendant had done nothing to protect the numerous children in the neighborhood during the two years the pool had existed. This was in spite of the fact that the dangerous condition could have been remedied easily, as was done shortly after the accident, by simply filling in the pond.

55. O'Connor v. Illinois Cent. Ry., 44 La. Ann. 339, 10 So. 678 (1892).
56. Hendricks v. Kansas City Southern Ry., 142 La. 499, 77 So. 130 (1917).
57. McDonald v. Shreveport Rys., 174 La. 1023, 142 So. 252 (1932).
58. Sullivan v. Huidekoper, 27 App. D.C. 154, 5 L.R.A. (N.S.) 263, 7 Ann. Cas. 196 (1906), quoted with approval in McKenna v. City of Shreveport, 133 So. 524 (La. App. 1931).
59. See Note (1925) 36 A.L.R. 224-237. But one recent Texas case, Banker v. McLaughlin, 208 S.W.(2d) 843(Tex. 1948), reinstated the doctrine of Sioux City Ry. v. Stout, 84 U.S. 657, 21 L.Ed. 745 (1873) in Texas. The court held a landowner liable under simple negligence principles.
60. Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.(2d) 791 (1949).
61. Ibid.

In the *Jackson* case[62] the highly dangerous leak in the gas line could have been repaired with little inconvenience and at a nominal cost.

(5) *The injured child must be very young.*

The attractive nuisance doctrine is predicated upon society's interest in protecting those of its members who are incapable of protecting themselves. Consequently, if the child is capable of appreciating the danger to which he exposes himself, the doctrine can have no application. Although each case must be viewed in the light of the particular danger involved, it is generally held, as a matter of law, that a child under the age of seven cannot be contributorily negligent.[63] However, testimony concerning the child's intelligence and mental capacity is admissible for the court's consideration in determining whether the child did, in fact, understand the dangerous nature of his act.[64]

The oldest child to recover under the attractive nuisance doctrine in Louisiana was a six-year-old girl,[65] whose injuries resulted from a highly dangerous, invisible, and inoderous gas.[66]

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62. Jackson v. Texas Company, 143 La. 21, 78 So. 137 (1918).

63. Williams v. Missouri Pac. Ry., 155 La. 349, 99 So. 286 (1924); Hunt v. Rundle, 120 So. 696 (La. App. 1929); Palermo v. Orleans Ice Mfg. Co., 130 La. 833, 58 So. 589, 40 L.R.A. (N.S.) 671 (1912).

64. Westerfield v. Levis Brothers, 43 La. Ann. 63, 9 So. 52 (1891); Marquette v. Cangelosi, 148 So. 88(La. App. 1933).

65. Jackson v. Texas Company, 143 La. 21, 78 So. 137 (1918).

66. Three courts of appeal cases decided subsequent to the writing of this comment tend to substantiate the views expressed therein.

In Browne v. Rosenfield's, Inc., 42 So. (2d) 885 (La. App. 1949), a department store was held not liable for injuries sustained by a 6 year old boy while riding an escalator in defendant store. The court noted that escalators are a very convenient and necessary means of carrying on the business of a modern department store, and that "that an important consideration is to be given to the use that is made of the instrumentality in order to classify it as an attractive nuisance or not. . . .' The tendency of the courts is to exclude from the application of the attractive nuisance doctrine . . . natural conditions, common or ordinary objects such as walls, fences and gates, simple tools and appliances and conditions arising from the ordinary conduct of a business.'" (42 So.(2d) 885, 887).

Watts v. Murray, 43 So. (2d) 303 (La. App. 1949), held that a cause of action was stated in a petition that alleged that a sixteen-months old child, while wading in a shallow ditch alongside a gravel plantation road that children were accustomed to using, was attracted to and drowned in a water-filled cement vat on defendant's land 10 feet from the road. Although a calf had previously drowned in it, defendant had taken no action to guard against a similar accident. The court particularly stressed the "unusual or artificial feature" of the vat and the complete inability of the child to comprehend the danger involved, even though it was not concealed or hidden.

In Whitfield v. East Baton Rouge Parish School Board, 43 So. (2d) 47 (La. App. 1949), defendant was held not liable for the drowning during the recess period of a seven-year old school boy in a natural drainage ditch