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THE ATTRACTIVE NUISANCE DOCTRINE
IN THE VIRGINIAS

WILLIAM C. BEATTY*

Lord Kaimes once said that "of all subjects of property, land is what engages our affections most" and although he spoke of a day somewhat earlier than this, his statement has not had its efficacy eroded by the passage of time. The private ownership of real property is the rootstock of our capitalistic civilization, and the legal protections afforded this right have permeated our entire structure of jurisprudence. While the limiting power of the state has been recognized, it nevertheless has been deemed socially desirable that a possessor of land be allowed an exclusiveness of possession that will afford a maximum of use with a minimum of interference from organized society. He may not, of course, so use his land as to encroach upon the legitimate rights of others. On the other hand, no one generally has a right to enter his premises without his consent, and as a general rule he is neither legally obliged to put his land in safe condition for the reception of interlopers nor is it incumbent that he carry out his activities on the land in such a manner as not to endanger intruders.

Normally the common law courts have been extremely reluctant to impose restrictions on the use of real property, but when the social utility of the individual land occupier's conduct has been outweighed by the danger of harm to society they have not hesitated to circumscribe such use. Accordingly, at least four well defined exceptions to the established rule of non-liability to trespassers have developed at common law:

(1) The possessor of land owes a duty to abstain from wilful or wanton injury to trespassers.  
(2) The possessor of land owes a duty to use ordinary care under the circumstances to a discovered trespasser.  
(3) The possessor of land is liable for conditions created by him in such close proximity to a highway as to be dangerous to users of the highway.

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1As quoted by Washburn, Real Property (4th ed. 1876) 2 at n. 1.
2See 65 C. J. S. 447.
(4) The possessor of land who knows that trespassers frequently intrude upon a limited area is under a duty to exercise reasonable care as to the activities carried on in that area. 5

More recently this tendency to balance interests has particularly manifested itself where small children are concerned. In one pan of the scale of justice is placed the inherent right of the landholder to an unrestrained enjoyment of his property and in the other rests the humane instincts of a society which wishes to preserve childhood so that it might flower into manhood. 6 Thus, to borrow a phrase from Lord Kaimes, the courts are faced with determining "what engages our affections most." For most of them the bounty of affection would now appear to be children, and as a direct outcome of this at least two-thirds 7 of the American jurisdictions have engrafted a further exception on to the non-liability rule by means of a doctrine which fixes a responsibility on the possessor of realty toward a child trespasser of tender years whose presence and injury on the premises is foreseeable. The history of this doctrine, which has now come to be familiarly known by the misnomer of "attractive nuisance," 8 presents a chronicle of confusion and perhaps no proposition of law has caused a greater divergence of judicial opinion. Some of the courts which recognize the attractive nuisance exception frankly admit that it is a policy expedient conceived out of the necessity of protecting those who are too immature to protect themselves, and, yet, others accepting it have attempted to rationalize it on the basis of principles of the common law. About a dozen jurisdictions, including the states of Virginia and West Virginia, have found the doctrine untenable and have steadfastly maintained that there is no precedent in the common law on which the doctrine can logically be founded. 9 In order to understand this in-

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5 John P. Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S. E. 813 (1919); 65 C. J. S. 445.


7 Prosser, Law of Torts (1941) 618.

8 "Nuisance" because of a supposed analogy to conditions dangerous to children in the highway; "attractive" because it was thought essential that the child be allured onto the land." Prosser, Law of Torts (1941) 618 at n. 14. Calling it a nuisance begs the question for this is merely another way of saying the law imposes a duty and as a result the very thing that is necessary to be established is assumed. See Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 434. This doctrine has also been termed the doctrine of the turntable cases and has sometimes been referred to as the doctrine of the torpedo cases, but it is more familiarly known as the attractive nuisance doctrine.

9 Those states which now refuse the doctrine, as such, appear to be Connecticut, Maryland, Massachusetts, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia. The United States Court of Appeals for the Third Circuit has recently interpreted Strang v. South Jersey Broad-
transigency, a consideration of the precedents now becomes imperative.

The leading attractive nuisance case in the United States is *Sioux City and Pacific R. Co. v. Stout.* There a six year old boy trespasser was injured while playing upon an unlocked turntable on the property of a railroad. The instrumentality was located near a travelled road in a neighborhood where few houses were located. It was shown that an employee of the railroad had knowledge that boys were inclined to play on the turntable and that while he was not in charge of the device he had forbidden the children to play on it, without communicating his knowledge to his superiors. The injured child recovered a judgment in the lower court and this was affirmed by the United States Supreme Court on the theory that the railroad had negligently maintained a dangerous machine which would likely cause injury to children who could be expected to come to it for amusement. To the allegation that the plaintiff child was a trespasser and therefore should not recover, Justice Hunt, speaking for the court replied:

“A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of *Lynch v. Nurdin,* the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In *Birge v. Gardner,* the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In *Daley v. Norwich and Worcester Railroad Company,* it is said the fact that the person was trespassing at the same time is no excuse unless he thereby invited the act or his negligent conduct contributed to it.

In *Bird v. Holbrook,* the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable.”

Nevertheless it has been demonstrated that not one of the four cases cited in the above passage sustains the liability fixed on the railroad under the facts of the case. These cases all come within other rules or within the well defined exceptions that have previously been

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casting Co., 86 A. (2d) 777 (N. J. 1952) as holding that New Jersey now accepts the doctrine. McGill v. United States, C. A. 3d, decided January 7, 1953 and as yet unreported. However, it must be pointed out that a reading of the Strang case will not disclose an express recognition of attractive nuisance.

17 Wall. 657, 21 L. ed. 745 (1873).

*Sioux City and Pacific Railroad v. Stout,* 17 Wall. 657, 660, 21 L. ed. 745, 748 (1873).

See Note (1925) 36 A. L. R. 34, 49.
considered. In *Lynch v. Nurdin*,\(^{13}\) the first case referred to by Justice Hunt, the defendant's servant left his cart and horse standing alone in the public street at the door of a house into which the servant had entered. During the half-hour absence of the servant several children gathered about the cart, and the plaintiff, a boy of seven, through curiosity and without permission climbed aboard. When he started to get off one of his small companions caused the horse to move. The boy then fell beneath a wheel of the cart and broke his leg. There is considerable difference in the facts of this case and those of the *Stout* case. Here the boy was not on the land of the defendant, and the cart was improperly attended in a rather crowded public street where the child had an equal right to be. In the *Stout* case the turntable was on the land of the defendant; it was a legitimate and proper instrumentality for carrying on a railroad business; and the child was a trespasser without any right to be on the premises. Furthermore, *Lynch v. Nurdin* probably turned on whether the child had been contributarily negligent, and counsel for the plaintiff conceded the negligence with little or no discussion of the duty resting on defendant to safeguard the child.\(^{14}\) The inference to be gotten from the report is that the jury decided that the owner of the cart was guilty of negligence and that the child had acted as prudently as a child could be expected to act even though he technically trespassed on a chattel. It is important to notice that there was no trespass upon real property.

*Birge v. Gardner*,\(^{15}\) which was the second decision relied on to support the court's conclusion in the *Stout* case, is reputed to have gone off on the principle that an owner of land cannot so use land near a highway as to create a public nuisance.\(^{16}\) Undoubtedly the facts giving rise to the case sustain this theory. A gate was erected on a lane used as a passage way to the house of the child who was injured. The child, age seven, shoved and pulled at the gate and as a result the gate fell on the child breaking his leg. Under these facts the child was possibly not a trespasser, and in fact, the Connecticut court refused to decide specifically whether the child was a trespasser.

Another rationale of the case would seem to lie in the remark that "There is a class of cases, in which defendants have been held responsible for their misconduct, although culpable acts of trespassers by plaintiffs produce the consequences; as in the cases of spring-guns

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\(^{14}\) See *Bottom's Adm'r v. Hawks*, 79 Atl. 858 at 861 (Vt. 1911).
\(^{15}\) 19 Conn. 507, 50 Am. Dec. 261 (1849).
and man-traps, etc." If the court meant to say that maintenance of a gate of so fragile a nature that it would fall on a trespassing child who shook and pulled it was wanton conduct, then clearly the court was mistakenly trying to fit the case under the well established exception that a possessor of land owes a duty not to injure a trespasser wilfully or wantonly.

The third case used by Justice Hunt in the Stout case was Daley v. Norwich and Worchester Railroad Company, another Connecticut case. A three year old girl was hurt on the tracks of a railroad company, but the court felt that if the little girl was a trespasser she was only technically so and therefore because of immaturity was in reality not a trespasser. Inasmuch as the authorities depended on by the court were Lynch v. Nurdin and Birge v. Gardner, it can hardly be said that this case added anything new in the way of doctrine. However, it must be emphasized that this was the first American case to present clearly the issue of trespass to real property without interference of other conflicting concepts. Here the child was on the defendant's reality without permission; in the Lynch and Birge cases this had not been so.

The last of the authorities put forth by the Stout case opinion as a precedent for the turntable doctrine was Bird v. Holbrook. This was a spring gun case pure and simple. As Judge Peckham pointed out in Walsh v. Fitchburg R. Co., the difference between the Bird case and the turntable cases is so plain as to require no discussion. It might also be observed that the child plaintiff in the case was a mere child of nineteen.

Regardless of the insecure basis of the Stout case in precedent, the die was cast and subsequently the attractive nuisance doctrine, after suffering reverses, has gradually gained widespread indorsement. Courts that approve of the doctrine have been aware of its unstable foundation, and have suggested various ways to bring it into harmony with fixed rules of law. In the main, it has been justified by fictions of the following sort: dangers on the premises beyond the comprehen-
hension of a child constitute a trap; failure to take precautions for children who might be anticipated amounts to wantonness; the child has an "implied invitation" to enter and is therefore a licensee; the child has been enticed onto the premises and hence the possessor is himself responsible for the trespass; or the child, because of his immaturity, is not capable of a trespass.\textsuperscript{22}

The more introspective thinkers have assayed the problem for what it is—one of balancing of interests.\textsuperscript{23} Over fifty years ago Judge Jeremiah Smith, a vigorous opponent of attractive nuisance, showed that the doctrine cannot be justified by reference to common law precedents. Instead, said Judge Smith, the true ground for such decisions "is policy in the Benthamic sense 'of the greatest good to the greatest number,' and the advantage to the community, on the one side and the other, are the only matters really entitled to be weighed."\textsuperscript{24}

The better authorities among those who approve of the doctrine now agree with Judge Smith,\textsuperscript{25} and it has been decided that the "attractiveness" of the instrumentality no longer governs the imposition of liability.\textsuperscript{26} The modern doctrine, once the policy of protecting the child is adopted, is predicated on foreseeability of harm, but there is at this time no agreement as to what circumstances it should apply to. The Restatement of Torts contains the best and most concise declaration of the doctrine that has yet been made:

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as

\textsuperscript{22}For a discussion of the cases using these fictions see Note (1925) 36 A. L. R. 34 beginning at 109.

\textsuperscript{23}In Shell Petroleum Co. v. Beers, 185 Okla. 331, 91 P. (2d) 777 at 781 (1938) the true basis of the doctrine was stated to be as follows: "The doctrine presents a necessity of compromise between the policy of refraining from imposing duties restricting a landowner in the use of his premises, weighed against the harm that urges the imposition. In one of the pans of the balance is the interest of society in the safety of its children, and in the other is the inherent right of a landowner in the enjoyment of his property in connection with economic progress."

\textsuperscript{24}Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 360.

\textsuperscript{25}See Restatement, Torts (1934) § 339 at p. 925.

\textsuperscript{26}See Gimmestad v. Rose Bros. Co., 261 N. W. 194 at 196 (Minn. 1932); also Hudson, The Turntable Cases In The Federal Courts (1929) 36 Harv. L. Rev. 826 at 850.
involving an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Although this view prescribes four conditions that must be met before the doctrine can come into operation, it still leaves much to the discretion of a particular court in deciding whether or not these requirements have been met. It is still a subject that is governed to a great extent by "the judicial heart" and it has been shrewdly observed that "some courts are very humane, almost foolishly so; while others seems to be constituted of unmarried or childless men—courts of barons so to speak."

With that background, then, let us consider the Virginia and West Virginia decisions which repudiate the doctrine.

The Doctrine in Virginia

The decision of the Virginia Supreme Court of Appeals in Clark v. City of Richmond presaged the progression of cases that was to effect the repudiation of the attractive nuisance doctrine in Virginia. There a six year old boy strayed from a city sidewalk, climbed upon a low brick wall immediately adjacent to the sidewalk and then proceeded to fall from it into an excavation being conducted by the city on the other side of the wall. Recovery was refused and it was said that the duty of a municipality to maintain its streets could not be extended "to the protection of children against every sudden freak that may possess them." Plaintiff's counsel asserted that the situation was alluring and enticing to children and based the claim squarely on the attractive nuisance theory. However, the court did not then renounce the doctrine, but merely pointed out that while the Stout case had applied it, there were no cases, in so far as the court was aware, that had employed the doctrine to find liability in a fact situation like that presented by the case at hand.

27Restatement, Torts (1934) § 339.
28Browne, The Allurement of Infants, 31 Am. L. Rev. 891 as quoted in Note (1925) 36 A. L. R. 34, 39 in the footnote continuing from 38.
29Va. 355, 5 S. E. 369 (1888).
30Va. 355, 5 S. E. 369, 371 (1888).
A number of years after the City of Richmond case was decided, Virginia's own turntable case arose. In Walker's Administrator v. Potomac, F. and P. R. Co. the plaintiff's decedent, a lad of twelve, mashed his foot while playing without permission on an unlocked railroad turntable. Again the Stout case was brought forth to demonstrate that the usual rule of non-liability to trespassers was not applicable when the intruder was cloaked in the immunity of childhood. In brief but incisive analysis, Judge Buchanan, speaking for the court, unmasked the fictions that had been so studiously manufactured to bring the doctrine into consonance with firmly fixed common law precepts.

The four cases the Stout case had relied on for support were rejected on much the same grounds as have been set out earlier in this comment. "Those cases," said Judge Buchanan, "come within well defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger." The constructive invitation theory based on Bird v. Holbrook, a spring gun case, and Townsend v. Wathen, a case in which a piece of tainted meat was deliberately used to entice a dog onto premises for the purpose of poisoning it, was attacked as a confusion of negligence with intentional wrongdoing. And it was observed that those courts which had rather glibly quoted the maxim "sic utere tuo ut alienum non laedas" as a basis for attractive nuisance were conveniently overlooking the decisive fact that the maxim refers only to a use that might have deleterious effect beyond the boundaries of the land upon which the use takes place. After unmasking these fictions the court concluded that the attractive nuisance doctrine was not soundly conceived and that its only base was one of policy. If the demand of new conditions could not be met by the flexibility of the common law, as it obviously could not be in the case of the attractive nuisance doctrine, then, said the court, the challenge must be met by the legislature, not the judiciary.

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\(^{31}\) Va. 226, 53 S. E. 113 (1906).
\(^{34}\) East 277, 9 R. R. 553 (1808).
\(^{35}\) "So use your own as not to injure another's property."
\(^{36}\) Also see Smith, Liability of Landowners To Children Entering Without Permission (1898) 11 Harv. L. Rev. 434 at 440.

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The court seems to be saying that common law courts do not make policy. But the fact remains that however assiduously they may try to avoid such determinations the common law courts do formulate policy, and the common law has gen-
Consequently the Virginia court was put on record as totally rejecting the doctrine.

By 1913 the anti-attractive nuisance rule was immutable in Virginia juristic thought and the Supreme Court of Appeals had begun to cite the Walker case in answer to plaintiffs raising the attractive nuisance argument. In Kiser v. Colonial Coal and Coke Co. it was said:

"In Walker v. Potomac, etc., R. Co., supra (a turntable case in which an infant was killed), the authorities are reviewed at length, and the court reaches the conclusion that the rule that a landowner does not owe to a trespasser the duty of keeping his land in a safe condition applies as well to infants as to adults." 38

The Kiser case involved a little girl hardly more than three. The child lived with her parents in a mining community in a company house situated near the mine motor road. Her family along with others in the area were accustomed to using a path which crossed the track and led to a commissary. Parallel to the track were poles carrying a small electric wire which had broken several times prior to the casualty and had generally been repaired in crude fashion by any employee of the company who by chance came upon the break. Shortly before the child happened by, the wire broke again at a place about five feet from the path that crossed the tracks. The little girl wandered from the path, picked up the charged wire and touched it to one of the rails of the motor road. The ensuing flash caused by the grounding of the wire set fire to the child's clothes and she died two days later from the burns. The court held her to be a trespasser or at best a bare licensee to whom no duty of pre-vision was owed. 39

The antipathy to the doctrine continued to grow. In Morris v. Peyton 40 it was said that "what is known as the doctrine of the Turntable Cases has been repudiated and very properly so, in Virginia." And Filer v. McNair asserted that "the doctrine of attractive nuisances generally established tests of responsibility on the basis of the demands of life in the social state. An example of this function can be seen in the limitations that even the property-minded English courts were willing to place on the free use of land in order to safeguard a trespasser from wilful or wanton injury. Justice Holt in a dissent in Beacher v. McFarland, 183 Va. 1, 31 S. E. (2d) 279, 281 at 283 and 284 (1944) attempts to fix liability to the child trespasser on the ground that the legislature had intervened and had fixed a duty by statute. 31

38115 Va. 346, 79 S. E. 348, 349 (1913).
39115 Va. 346, 79 S. E. 348 at 349 (1913).
40148 Va. 812, 139 S. E. 500, 503 (1927). This case did not turn on the attractive nuisance principle for the child involved was not a trespasser nor a mere licensee and the accident did not occur on real property. Instead, the child was jostled off a moving truck on which he was riding with permission from the driver.
does not obtain in this state.” But in *Richmond Bridge Corporation v. Priddy* it became evident that the court would not allow this aversion to deter it from imposing liability on a possessor of land for injuries received by a child who had actually been invited on the premises.

In view of the consistent refusal to accept the attractive nuisance rule, the remarks of the court, stated by way of dictum, in *Town of Big Stone Gap v. Johnson* are startling. The town maintained a park for public recreational purposes. A running track was being graded by employees of the municipality and at the cessation of work one evening the driver of a road grader parked it near a playground area in the part of the park that had been designated for the use of small children. The driver had hardly left the scene of his day of labor when the customary barefoot boys of inquisitive propensity descended upon the machine. The boys were successful in manipulating the scraper blade of the grader into a raised position. While one boy held the blade in the air by means of the foot brake another mounted it for the purpose of riding it on its descent toward the ground. In releasing the brake, the “brakeman” caught his foot in some cogwheels and was injured.

A statute limited the civil liability of a city or town in the maintenance of recreational facilities to cases of “gross or wanton negligence.” It was alleged in a notice of motion for judgment against the town that the exposure of the machine to the inquisitiveness of childhood was such as to amount to “gross or wanton negligence.” The court specifically stated that:

> "The suit of the plaintiff below is grounded on what is commonly referred to as the 'attractive nuisance' doctrine. Under the doctrine one who leaves accessible to small children an instrument, machine, or appliance, which he knows, or ought to know, is attractive to children, and yet is dangerous to them, is guilty of negligence. The two necessary elements of the tort are that the appliance is known to be attractive to children and known to be dangerous to them."

> "It is not difficult to envision a situation where one or both

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169 S. E. 335, 337 (1932). This, again, was not an attractive nuisance case. The plaintiff was not a trespasser, but was in his own home where he had a right to be.

167 Va. 114, 187 S. E. 518 (1936). Here a company constructing a bridge was using a portion of a city park with consent of the city. A child playing in the park was injured when he fell in an excavation that was a part of the construction project. The court held that the child had a right to be in the public park and that he was therefore owed a duty of ordinary care.

184 Va. 375, 35 S. E. (2d) 71 (1945).

See 184 Va. 375, 35 S. E. (2d) 71 at 73 (1945).
of these elements may be magnified to such a degree that leaving a particularly dangerous machine or appliance accessible to small children may constitute gross or wanton negligence. But such is not the case before us."

After this statement the court proceeded to show that the town officials had no knowledge or had no reason to believe the scraper to be attractive to children. Also there was no proof that the machine was dangerous to children. Then the court made an assertion that is astonishing and even redundant if the prior decisions concerning attractive nuisance are to be regarded:

"Whether the act of the town employee in leaving the machine near the children's playground, under the circumstances stated, amounted to ordinary or simple negligence we do not decide. It is certain, we think, that it did not constitute gross or wanton negligence within the meaning of the statute."

These remarks would imply that if a proper set of facts were to be presented, the court would apply the attractive nuisance doctrine. If they do not, then there was no reason for the court to discuss the elements of the doctrine, and all that would have been necessary would have been to reiterate that the doctrine did not obtain in Virginia. However, this case has not been cited or followed. More recently in Washabaugh v. Northern Virginia Const. Co. the court seems to have foregone any notion of departing from its previous position and has once again emphasized that "The doctrine of 'attractive nuisance' or the doctrine of the 'turntable cases' has been repudiated in this jurisdiction." 47

The Doctrine in West Virginia

West Virginia, like Virginia, has expressly repudiated the doctrine. In Tiller v. Baisden 48 Judge Fox, speaking for the court, delivered the most recent blow at the doctrine and while so doing collateral the West Virginia cases which disapprove of it. Judge Fox said:

"... It has repeatedly been held by this court that the doctrine of attractive nuisance is not recognized in this state. Ritz v. City of Wheeling, 45 W. Va. 262, 31 S. E. 993; Uthermolen vs. Boggs Run Min. and Mfg. Co., 50 W. Va. 457, 40 S. E. 410; Conrad v. Baltimore & Ohio Railroad Co., 64 W. Va. 176, 61 S. E. 44; Martino v. Rotondi, 91 W. Va. 482, 113 S. E. 760; Adams,

42 Va. 375, 35 S. E. (2d) 71, 73 (1945).
43 Va. 375, 35 S. E. (2d) 71, 74 (1945).
44 Va. 767, 48 S. E. (2d) 276, 277 (1948). This case turned on the dangerous instrumentality rule which will be discussed at a later point in this comment.
45 W. Va. 126, 35 S. E. (2d) 728 (1945).
Strangely enough *Ritz v. Wheeling*, the first West Virginia case on the subject, like the first Virginia case on the attractive nuisance doctrine, involved a suit against a municipality. In the *Ritz* case a child trespasser of less than five was drowned in a city reservoir. Although the court believed that the city had exercised reasonable precautions under the circumstances, it, nevertheless, took the opportunity to attack the policy behind the attractive nuisance doctrine. Since this case is the first in which the West Virginia court unreservedly puts itself in the column of those jurisdictions which refuse to apply the doctrine, extensive quotation from the opinion will be used to give an insight into the reasons for the court's aversion to the doctrine. The court summarized the theory of the doctrine and then expressed a dislike for it in the following manner:

"... The position is sought to be supported by what is called the 'Turntable Cases' (Railroad Co. v. Stout, 17 Wall. 657, and other cases following it). In that case a boy was injured while playing on a railroad turntable left unlocked, and was allowed to recover . . . But the Stout case, if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business."  

The court, in continuing to point out the absurdities of an unbridled application of the doctrine, said in lucid language:

"And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? 'A child's will is the wind's will.' Almost everything will attract some child. The pretty horse or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the streets, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well
said in Gillespie v. McGowan, 100 Pa. St. 144, this rule ‘would charge the duty of the protection of children upon every member of the community except their parents.’ A very nervous duty! . . .”

The next case to take up a consideration of the doctrine was Uthermohlen v. Boggs Run Min. and Mfg. Co. There a boy trespasser was seriously injured on the defendant’s premises when his leg was caught between a pulley and a cable. No recovery was allowed and the rule of the Ritz case was reaffirmed. It was pointed out that the Stout case argument was spent trying to show negligence, seemingly forgetting that before that question could be reached a duty to the injured child had first to be established. Again policy seemed to be a prime consideration for it was said that:

“The doctrine of the Turntable cases shifts the duty of watchfulness and care from the shoulders of parents, where the Creator has placed it, to the shoulders of the land owner using his property to make a living, and this materially distracts from the full ownership of property, sacred under our Constitution. It is an infringement upon the right of property.”

The third West Virginia case, in point of time, that rejected the doctrine was Conrad v. Railroad Co. This case was a true “turntable” case, for there a twelve year old youngster was injured while playing on an unlocked and unguarded turntable located in a densely populated area. The opinion of this case thoroughly considered the doctrine. The maxims of “sic utere tuo ut alienium non laedas” and “prohibetur quis facia in suo quod nocere possit alieno” were properly rejected as being inapplicable to trespassers, and the supposed analogy of the turntable cases to Lynch v. Nurdin was denounced because the Lynch case did not involve an injury received on real property. Notwithstanding the soundness of these legal arguments the court also indulged in a balancing of interests and found the high regard for property on the heavy side of the scale when it said:

“... it would be highly repugnant to our sympathies and natural impulses to withhold from a crippled child any possible right the law gives him; but it is not the province of the courts to make laws, or give rights not conferred by law, and we could

52 45 W. Va. 262, 31 S. E. 993, 996 (1898).
50 49 W. Va. 457, 40 S. E. 411 (1901).
50 49 W. Va. 457, 40 S. E. 411, 414 (1901).
64 64 W. Va. 176, 61 S. E. 44 (1908).
65 “It is prohibited to do on one’s own property that which may injure another’s.”
not do so in this instance without enunciating a principle which carried to its logical results would impose an extensive and burdensome restraint upon the dominion of owners over their own property."

The Conrad case was approved by Martino v. Rotondi. In that case an owner of a city lot piled lumber thereon to be used for construction purposes. A small child while playing on the abutting sidewalk was crushed to death when the lumber was dislodged by a playmate. The plaintiff contended that it was incumbent upon the defendant to anticipate that children would play on the lumber pile, and that the defendant was negligent in that he failed to guard against that contingency. To the court it was plain that the plaintiff was bottoming the case on the attractive nuisance theory, and while it was admitted that some courts sustain the principle, the West Virginia court took the opportunity to express confidence in the soundness of the Ritz and Conrad cases.

In Simmons v. Chesapeake & O. Ry. Co., plaintiff was a nine year old who lived with his father in a house leased from the railroad. The railroad maintained a tool house in which explosives were stored about one hundred fifty feet from the house, and the plaintiff and his brothers and sisters were accustomed to play around and under the tool house which rested on a high, unenclosed foundation. One day while playing, the plaintiff found a shiny dynamite cap under the tool house. Motivated by the desire to hear the cap explode, but being totally unaware of the latent force constrained within it, the boy placed the cap on the rail of the railroad track and struck it with a large bolt. The ensuing explosion destroyed the sight in one of his eyes.

It was insisted that the railroad was guilty of negligence because

\[64\text{ W. Va. 176, 61 S. E. 44, 46 (1908).}\\
\[91\text{ W. Va. 482, 113 S. E. 760 (1922). It should be noted that Dickinson v. New River & Pocahontas Consol. Coal Co., 76 W. Va. 148, 85 S. E. 71 (1915) also approved of the Conrad case. The Dickinson case did not discuss the attractive nuisance doctrine any more than to say that children were on the same footing as adults. However, the following statement from that case does give an excellent summary of the policy which dictates the anti-attractive nuisance view in West Virginia: "There is moral wrong, even cruelty and inhumanity, in the doing of many things which the law does not prohibit, and in the failure to do many things which the law does not require. Such acts and duties are not legally prohibited or imposed, because to prohibit or impose them would be inconsistent with legal rights on the part of the actors which, in the opinion of mankind, it would be unwise to impair or burden, such as rights of property and personal liberty. The law does not assume to regulate, govern, or control the conduct of men in all respects, but only so far as the common good is deemed to require it." 76 W. Va. 148, 85 S. E. 71, 73 (1915).}\\
\[97\text{ W. Va. 104, 124 S. E. 503 (1924).}\\
it had failed to enclose the tool house and to keep the premises around it free from explosives. The circuit court in which action was begun sustained defendant's demurrer to the declaration and then certified the question to the supreme court. The Supreme Court of Appeals found that since the father had no right to use the tool shed under the terms of the lease, the child was a trespasser who had no legal right on the railroad's premises. The fact that the child was of tender years was of no consequence and the ruling of the lower court was sustained as the court again refused to adopt the attractive nuisance doctrine.

Shortly after the decision in the railroad case, the court was faced with a *Lynch v. Nurdin* situation in which a child was injured while meddling with a road scraper located in a public road. The declaration filed in *Rine v. Morris* alleged that the defendants were engaged in constructing a state road and that they had been negligent in allowing the scraper to remain in an unsafe condition at a place where the child had a right to be. The defendants claimed that the allegation meant that the road was unfinished and therefore not open for public use. As a result the plaintiff was a trespasser to whom the defendants owed only a duty not to wilfully or wantonly injure. The lower court sustained a demurrer to the declaration on this basis, and the state Supreme Court of Appeals upheld the ruling on the authority of the *Conrad* case. However, that court granted the plaintiff leave to amend his declaration so as to show that the road was at the time of injury a public way. The court used *Lynch v. Nurdin* to show that a duty exists to use ordinary care in regard to children who are in places where they have a right to be. This use of the *Lynch* case was not at all inconsistent with the previous position of the court, for it will be remembered that in the *Conrad* case the court denied that the *Lynch* case was analogous to the turntable cases on the ground that the turntable doctrine was an attempt to impose a duty to care for conditions existing on private premises whereas *Lynch v. Nurdin* involved actions in a public place. Consequently the *Rine* case holding is eminently sound and does not in any way weaken the anti-attractive nuisance rule.

Again in *Adams v. Virginian Gasoline & Oil Co.* it was repeated that attractive nuisance is repudiated in West Virginia. Then more recently in *White v. Kanawha City Co.*, a case of a drowning in an

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*1 Q. B. 29, 113 Eng. Rep. 1041 (1841).*
*29 W. Va. 52, 127 S. E. 908 (1925).*
*Conrad v. Railroad Co., 64 W. Va. 176, 61 S. E. 44 (1908).*
*109 W. Va. 63, 156 S. E. 63 at 66 (1930).*
ATTRACTIVE NUISANCE DOCTRINE

artificial pool, an attempt to invoke the doctrine was assailed as a futile gesture because "that doctrine is not enforced or recognized in this state."63

The Dangerous Instrumentality Rule

Upon the surface the courts of Virginia and West Virginia would appear to be composed of "childless men—barons so to speak," but the fervent protestations of aversion for attractive nuisance emanating from these courts are deluding if considered in isolation. For closely akin to the attractive nuisance doctrine is the position maintained in these jurisdictions that one owning or in control of something on his premises which may legally be considered a dangerous instrumentality will be held liable for injuries resulting from a failure to use due care for the protection of child trespassers who might be injured by the instrumentality.65 In order for the doctrine to apply, the presence of the trespassing child must (a) either be known66 or must have been reasonably anticipated67 and (b) the danger of the instrumentality must be hidden, concealed or latent when handled by one unfamiliar with its use.68

Under this rule it has been held that powder,70 gasoline,71 and electric wires72 are dangerous instrumentalities, while fire,73 barbed

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70Tiller v. Baisden, 128 W. Va. 126, 35 S. E. (2d) 728 (1945). New Jersey has held that fire is a dangerous instrumentality. See Piraccini v. Director General of Railroads, 112 Atl. 311 (N. J. 1920).
wire,\textsuperscript{74} or a raft on a quarry pond\textsuperscript{75} have been held not to be. These latter agencies, in the eyes of the courts of the Virginias, differ from the former in that the danger is so clear that even a child of tender years can readily observe and recognize it. On the other hand electric wires or powder and the like appear innocuous when viewed from the eyes of a child. The danger inherent in powder becomes patent only when the match is struck; the electric wire is deadly only when the circuit is closed allowing the charge to surge through; and the toxic vapors of gasoline become manifest only when the liquid is enclosed. To put the proposition in other words, the danger in each of the named instrumentalities is not apparent or obvious. Accordingly whether a duty will be imposed upon a landholder to “take precautions for the safety of children depends upon whether the danger to which they are exposed is open, obvious, natural and common to all or whether it is hidden and latent.”\textsuperscript{76}

It is evident that the dangerous instrumentality rule is remarkably similar to the attractive nuisance doctrine.\textsuperscript{77} In fact one West Virginia case has gone to the extent of saying that “the principles upon which the doctrine of ‘attractive nuisance’ rested seem still to underlie the dangerous instrumentality doctrine.”\textsuperscript{78} But the West Virginia court has, in \textit{Tiller v. Baisden} also indicated that the dangerous instrumentality rule is a theory apart from the attractive nuisance doctrine,\textsuperscript{79} and the Virginia case of \textit{Daugherty v. Hippchen} has spoken of a general rule which demands that one who keeps a dangerous instrumen-

\textsuperscript{74}Beacher v. McFarland, 183 Va. 1, 31 S. E. (2d) 279 (1944).
\textsuperscript{75}Wasabaugh v. Northern Virginia Const. Co., 187 Va. 767, 48 S. E. (2d) 276 (1948). In White v. Kanawha City Co., 127 W. Va. 566, 34 S. E. (2d) 17 (1945) the West Virginia court said that artificial pools of water are not in themselves dangerous. See also Note (1949) 8 A. L. R. (2d) 1254 at 1287.
\textsuperscript{77}In the Restatement, Torts § 339, comment on clause (a), it is stated in part that “The duty of the possessor, therefore, is only to keep so much of the land upon which he should recognize the likelihood of children trespassing, free from those conditions which, though observable by adults, are likely not to be observed by children, or which contain risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them.” These words were written to explain the American Law Institute’s views on attractive nuisance, but they provide an apt epitome of the dangerous instrumentality rule.
\textsuperscript{79}128 W. Va. 126, 35 S. E. (2d) 728 at 730 (1945). This collates the West Virginia cases applying the doctrine.
tality on his premises must exercise a degree of care toward immature child trespassers commensurate with the danger involved. This same principle has been referred to as general law by the West Virginia cases of Colebank v. Coal and Coke Co. and Wellman v. Fordson Coal Co. Regardless of this, such a general rule cannot be sustained on any other basis than the attractive nuisance theory, and an analysis of the authorities on which these cases rely conclusively shows that the dangerous instrumentality rule is no more than an adjunct of that doctrine.

The courts of both states have erroneously depended to a large extent upon the authority of the Minnesota case of Mattson v. Minnesota & N. W. R. Co. and upon the Michigan case of Powers v. Harlow to show the separate existence of a general rule placing a possessor of land under a duty to safeguard trespassing children against dangerous instrumentalities on his premises. And yet, neither of these cases will support that proposition. The Mattson case rests squarely on the attractive nuisance doctrine and if that doctrine be unacceptable then the ratio decidendi of a case turning on it cannot be approved. This same argument may also be directed against Powers v. Harlow for

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80 175 Va. 62, 7 S. E. (2d) 119 at 120 (1940).
81 106 W. Va. 402, 145 S. E. 748 at 750 (1928). The Colebank case distinguished Simmons v. Chesapeake & O. Ry. Co., 97 W. Va. 104, 124 S. E. 503 (1924), supra page 33 of this comment, on the ground that disaster was not to be foreseen from the dynamite cap in that case. However, this distinction is not sound, for the Simmons case contains all the elements necessary to fix liability under the dangerous instrumentality rule. This inconsistency further demonstrates the non-existence of the so-called dangerous instrumentality rule.
82 105 W. Va. 463, 133 S. E. 160 at 161 (1928).
83 95 Minn. 477, 104 N. W. 443 (1905).
84 53 Mich. 507, 19 N. W. 257 (1884).
85 Although the Virginia Court has not specifically cited these two cases it has, nevertheless, relied on authority based upon the decisions in those cases. In Daugherty v. Hippchen, 175 Va. 62, 7 S. E. (2d) 119 at 121 (1940) the ct. cites Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. (2d) 785 rehearing denied 48 P. (2d) 769 (1935), a case which emphasizes the Mattson view. The Daugherty opinion also refers to Note (1926) 43 A. L. R. 434 which contains summaries of both the Mattson and Powers cases. It is interesting to consider that while this A. L. R. note professes not to cover cases dealing with the attractive nuisance doctrine at least ten of the cases cited to show the existence of the so-called general rule are attractive nuisance cases. Many of these are based on the Mattson and Powers decisions while the remainder can be distinguished on the basis of well-known exceptions to the non-liability to trespassers rule.
87 See Mattson v. Minnesota & N. W. R. Co., 95 Minn. 477, 104 N. W. 443 at 445 (1905).
that case is thought by some to have turned on the attractive nuisance principle as did the Mattson case. Furthermore, even if this be incorrect, it would appear that the injured child in the Powers case was on the premises by right, and hence the case is not controlling as to a situation involving a trespasser.88

Much of the misapprehension as to the existence of a separate dangerous instrumentality rule may be traced directly to Thompson's Commentaries on Negligence where it was said that the cases upholding a duty to child trespassers proceed on one of two grounds:

"1. That where the owner or occupier of grounds brings or artificially creates something thereon which from its nature is especially attractive to children, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them.

2. That although the dangerous thing may not be what is termed an attractive nuisance,—that is to say, may not have an especial attraction for children by reason of their childish instincts,—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so as to prevent injury to them."89

The second ground put forth above has been taken to mean that there is a separate foundation for the dangerous instrumentality rule, independent of the attractive nuisance doctrine. However, it would appear that Thompson was endeavoring to show that there were situations where an instrumentality could not be deemed attractive to children but where nevertheless great risk of harm could be foreseen to children who might be expected to come into contact with it. Thus he early recognized that the principle of the turntable cases could be extended to embrace non-attractive dangerous instrumentalities as well as those which are especially alluring to the inquisitorial techniques of the prying youngster, and his statement is entirely in accord

89Thompson, Commentaries on the Law of Negligence (2d ed. 1910) §1030. The Nevada court in Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. (2d) 785 at 788 (1935) quotes from this passage to show the existence of the so-called general rule. The Smith case is approved in Daugherty v. Hippchen, 175 Va. 62, 7 S. E. (2d) 119 at 121 (1940).
with the more modern authorities who now agree that the ingredient
of attraction in the so-called attractive nuisance cases is of importance
only in showing that a trespass is to be expected. Thompson was not,
to borrow an horticultural analogy, saying there were two trees; he was
merely pointing out that there were two limbs to the same tree. This
interpretation is substantiated by the fact that Thompson relied ex-
pressly on *Lynch v. Nurdin* for authority for his statement. In other
words the supposed general rule that the Virginia and West Virginia
courts here followed is based on the very same legal considerations
that those courts have so adamantly opposed when presented under the
guis of attractive nuisance. The difference is in name only. There-
fore, the dangerous instrumentality rule becomes in actuality only a
modification or adjunct of the attractive nuisance doctrine. It is an
attempt to reach a middle ground between the Draconian rule of non-
liability and the preposterous absurdities of an unbridled application
of the attractive nuisance doctrine. But however laudable and humane
such an effort may be, it is still untenable when based on cases like
*Lynch v. Nurdin* and its successors. Moreover, the persistent denun-
ciation of the attractive nuisance doctrine by the courts of the Vir-
ginias creates a strange anomaly—a sort of "now you see us now you
don't" proposition, in which counsel for the plaintiff, in order to sus-
tain a position under the dangerous instrumentality rule must rely
on cases decided in attractive nuisance jurisdictions with the threat
always impending that they will be informed that the attractive nuis-
ance doctrine does not "obtain in this State." On the other hand de-
fence attorneys cannot be safe in merely arguing that the attractive
nuisance doctrine is repudiated in these jurisdictions and they too
must resort to the cases of those jurisdictions that have embraced the

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60See Restatement, Torts (1934) § 330.
63 Some of the earlier cases on the rule in the Virginias cannot be said to rely
on the attractive nuisance principle, but the decisions in each of those cases can be
justified on grounds separate from any showing of dangerous instrumentality. In
Lynchburg Tel. Co. v. Bokker, 103 Va. 594, 50 S. E. 148 (1905) a child was injured
by an electric wire dangling near the public sidewalk. This might well have been
termed a dangerous condition existing in close proximity to a public way. Likewise
electric agency case that is often considered an application of the rule, would appear
to turn on the highway exception. In Wellman v. Fordson Coal Co., 105 W. Va. 463,
143 S. E. 160 (1928) where powder was declared to be a dangerous instrumentality, the
child was on the premises as an invitee. See Note (1928) 35 W. Va. L. Q. 91.
64 Filer v. McNair, 158 Va. 88, 163 S. E. 335, 337 (1932).
doctrine to show that a particular instrumentality has or has not been ruled to contain hidden danger for children of immature years. It would seem that a more definite standard should be adopted—perhaps that of the Restatement of Torts that was set out earlier in this comment. In that manner these courts could cease dealing in idle sophistries and frankly admit that because of humanitarian policy considerations they have deemed it advisable to follow a modified attractive nuisance doctrine.

96See supra this comment pages 25-26.
97The New Jersey Supreme Court, which has consistently repudiated the attractive nuisance doctrine, resorted to the Restatement of Torts § 399 (the attractive nuisance section) to sustain its position that fire constitutes a dangerous instrumentality. See Strang v. South Jersey Broadcasting Co., 9 N. J. 38, 86 A. (2d) 777 (1952). The court had previously reached the same conclusion in Piraccini v. Director General of Railroads, 112 Atl. 311 (N. J. 1920) under a dangerous instrumentality rule quite similar to that followed in the Virginias. In the Strang case it was said that the principle of Piraccini controlled, but the court relied heavily on the Restatement and cited Lynch v. Nurdin for the concept that the foreseeability of harm to a child trespasser is the basis of liability. Nowhere in the opinion was the attractive nuisance doctrine mentioned, but the court has, without saying so, delineated the modern view of that doctrine. Judge Goodrich in McGill v. United States, C. A. 3d, January 7, 1953, as yet unreported, has held that the Strang case now puts New Jersey into the column of states accepting the attractive nuisance doctrine. The New Jersey situation is a striking parallel to that in the Virginias.
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