

---

Volume 35  
Issue 3 *Dickinson Law Review - Volume 35,*  
*1930-1931*

---

3-1-1931

## The Attractive Nuisance Doctrine in Pennsylvania

Albert M. Hankin

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Albert M. Hankin, *The Attractive Nuisance Doctrine in Pennsylvania*, 35 DICK. L. REV. 158 (1931).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol35/iss3/8>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

*Estate, (1896)*<sup>22</sup> actual value to be determined from the best methods at command was the test adopted. After *Stake's Estate, (1913)*<sup>23</sup> book value was almost always used, but this test was repudiated in *Thompson's Estate, (1918)*<sup>24</sup> where the court said they were interested only in actual value and not concerned with book value. In view of this uncertainty *Baird's Estate (1930)*<sup>25</sup> at least offers temporary relief. It was there held that book value is the test. The court said, "The prima facie standard of measurement of intact value of trust estates, the income of which is to be paid to a beneficiary with remainder over, is the book value; and this standard remains fixed unless it can be established that the elements making up the book value are not true values". It is interesting to note the court's reasons for adopting this as a test as they show the courts are trying where possible to simplify the rule. It is pointed out that capitalization of income over long periods and the averaging of values cannot be considered because too uncertain for definite purposes; and actual appraisal, though sometimes necessary where book value is not available, is often impossible because of prohibitive costs.

W. H. Dunbar, III

---

#### THE ATTRACTIVE NUISANCE DOCTRINE IN PENNSYLVANIA

Running through almost every phase of its law, is an extraordinary protection given to infants in Pennsylvania. Sometimes, apparently, this protection was unwarranted. However, until recently it was never questioned that infant trespassers were in no better position than adults.

Within the past few years our courts, probably inadvertently, have allowed statements to creep into their

---

<sup>22</sup>175 Pa. 143.

<sup>23</sup>240 Pa. 277 and (No. 2) 240 Pa. 288.

<sup>24</sup>262 Pa. 278.

<sup>25</sup>299 Pa. 39.

opinions which intimated that we had adopted the doctrine enunciated by *Sioux City v. Stout*, 84 U. S. 657, that one leaving a dangerous machine on his land, likely to attract and likely to injure children, is liable for injuries to them, even though they are trespassers. Always such intimation has been by way of dicta, but the recent case of *Colligen v. Phila. Electric Co.*, 301 Pa. 87, 151 Atl.699 (Pa. 1930) was decided entirely on this doctrine, although the decision for the defendant is compatible with the previous cases not adopting this theory.

That case was one where the defendant maintained an electric transformer for the use of the Breyer Ice Cream Co. on the latter's lot. The apparatus was entirely surrounded by smooth steel walls, nine feet high, but without a roof. The plaintiff, a child of ten, obtained a ladder and climbed to the top of the structure, and on reaching it fell within the enclosure. Recovery was denied on the ground that this was not an attractive nuisance. This decision, however, is also sustainable on pure rules of negligence, which heretofore were the only rules governing this type of case.

It now becomes very questionable what the courts will do in a case where the doctrine of *Sioux City v. Stout* will apply in favor of the trespasser. Will they treat the *Colligen* case as binding only as to its decision and ignore the reasoning, thereby retaining the law in its present form, or will they, in adopting its reasoning, also adopt a principle of law, which at best is very doubtful as to its logic.

Until the present time it was admitted without the shadow of doubt that our law fully recognized the right of one having dominion of the soil, to do any lawful act on his premises, without malice, and leave the consequences of the act on him who has wandered out of his way, though the wanderer may have been guilty of no negligence.

The fact that the person injured was a child was deemed immaterial, except that it might relieve him of the charge of contributory negligence. On the other hand, the plaintiff's youth did not give rise to any imputation of

negligence on the part of the defendant.<sup>1</sup> The defendant was not regarded as owing him a duty if he would owe none to an adult under the same circumstances.<sup>2</sup>

Although the one hurt was of tender years, it did not alter his status as a trespasser.<sup>3</sup> To recover he was required to do more than show negligence. It must have appeared that there was a wanton or intentional injury inflicted on him by the owner.<sup>4</sup>

Within recent years, however, expressions have been allowed by our Supreme Court to creep into cases which intimate that we have adopted the rule as applied by the Federal Courts; one which probably has given rise to a greater divergence of judicial opinion than almost any other subject within the domain of law.

The first case to throw any doubt on our adherence to common-law rules of negligence in connection with infant trespassers was *Hydraulic Works Co. v. Orr*, 83 Pa. 332. A heavy platform had been suspended precariously over a private alley way, but the passage opened into a public and much frequented street. Children and often grown persons went into this alley on many occasions. On one of these occasions the platform fell, crushing beneath it several children, who were allowed to recover for their injuries although they were trespassers. This case, however, may easily be reconciled with that line of cases holding one liable for injuries to a trespasser, when one leaves a dangerous appliance on a public street or so near to one, that any one inadvertently walking on it might be injured by such object.<sup>5</sup> The basis of liability for the above principle is the negligence of the defendant in leaving a dangerous appli-

---

<sup>1</sup>*Thompson v. B. & O. R. Co.*, 218 Pa. 444.

<sup>2</sup>*Rodgers v. Lees*, 140 Pa. 475; *Conn v. Penna. R. R. Co.*, 288 Pa. 494; *Zamaria v. Davis*, 284 Pa. 525; *Walsh v. Pittsburgh Rys. Co.*, 221 Pa. 463; *Saar v. American Glass Specialty Co.*, 55 Pa. Super. Ct. 282.

<sup>3</sup>*Hojecki v. Phila. & Reading Ry. Co.*, 283 Pa. 444.

<sup>4</sup>*Hydraulic Works Co. v. Orr*, 83 Pa. 332.

<sup>5</sup>*Hildebrand v. Director General of Railroads*, 270 Pa. 86; *Euler v. Pittsburgh*, 85 Pa. Super. Ct. 542.

ance where it is reasonably foreseeable that it will injure someone, who is entirely within his rights.

In spite of the fact that the case might be explained as above, the courts have unequivocally said that it was decided on peculiar facts, and therefore must be limited to them.<sup>6</sup> The decision has been so explained and qualified by adjudications of our Supreme Court as to have been probably overruled.<sup>7</sup>

Only two other cases are in our reports which tend to bear out *Hydraulic Works v. Orr*. They are *Fitzpatrick v. Penfield*, 267 Pa. 564 and *Costanzi v. Pittsburgh Coal Co.*, 276 Pa. 90. Neither of these expressly adopted the rule of *Sioux City v. Stout*, but by dicta expressed sentiments in language which, at first glance, are only compatible with such adoption. But upon inspection we find that even were these expressions of the court not dicta they would have no effect on the problem under discussion, since the latter case confuses the doctrine of attractive nuisances with the rules governing land used for a number of years as a playground, while in the former case the expression "attractive appliance" was used without any logical connection with the language used before or after.

If the situation were left here, it might appear that the holding in *Colligen v. Phila. Electric Co.* was justified as the first pertinent judicial expression on the question, and controlling as a precedent although based on an illogical doctrine. But the situation cannot be left here, since there is a line of cases, expressly and in clear language, repudiating the federal rule of liability in the case of an infant trespasser and typified by the leading case of *Thompson v. B. & O. R. R. Co.*, 218 Pa. 444.

*Sioux City v. Stout* was decided solely upon humanitarian sentiment, without any consideration to the property rights of a landowner or the logic of the holding. The viciousness of the reasoning which fixes liability on a prop-

---

<sup>6</sup>Gillespie v. McGowan, 100 Pa. 144; Rodgers v. Lees, 140 Pa. 475; Feehan v. Dobson, 10 Pa. Super. Ct. 6.

<sup>7</sup>Keegan v. County of Luzerne, 8 Kulp 160.

erty owner lies in the assumption that what operates as a temptation to a person of immature mind, is in effect an invitation. Such an assumption is unwarranted and is not consistent with any other principle of law, for if a child is an invitee and he should carry off the attractive article, he would not be responsible for its conversion, either civilly or criminally. But it has never been held that such an implied invitation is a defense to such an act.

In addition the restraint created by the doctrine would amount to a prohibition upon the mode of beneficial use of land for the protection of intruders. An owner is not liable for leaving his land in its natural shape; why should he be held liable for placing structures upon it, harmless in themselves, and which are necessary for the lawful use he wishes to make of it? If such a principle should be the law, an owner could not make full use of his land for fear of injury to infant trespassers.

To hold otherwise would make everyone responsible for the negligence of parents except themselves,<sup>8</sup> and it cannot be contended that parents who permit their children to trespass on the property of another are not guilty of negligence.<sup>9</sup>

In conclusion, it is well to point out that *Colligen v. Phila. Electric Co.* did not pretend to be decided on stare decisis, and cited the general discussion of the problem of liability to infant trespassers in *Corpus Juris* as its only authority. The question, although before this case it might have been considered closed in this state, becomes an open one again and one of the utmost importance. Interested parties, consequently, should watch the next decision on the matter with the expectation of finding a definite statement on the matter.

Albert M. Hankin

---

<sup>8</sup>Thompson v. B. & O. R. R. Co., 218 Pa. 444; Gillespie v. McGowan, 100 Pa. 144.

<sup>9</sup>Cauley v. Pittsburgh Ry. Co., 95 Pa. 398.