allow the 'fair value' credit on his judgment even if he does not himself purchase the property at the foreclosure sale. In that event the mortgagee receives no consideration, either in money or real estate, for the enforced credit given by him to the mortgagor as representing a part payment which has no basis whatever in fact." [24]

It is apparent that if the court is to be consistent it will, on this ground also, hold the Act unconstitutional.

A lower court has held the Act constitutional, on the sole ground that a decision favorable to the legislation was necessary in order to make possible a test of it in the United States Supreme Court.[25] It seems not unlikely that the Pennsylvania Supreme Court will hold that a delay of two years in all foreclosures is unreasonable, and that the enforced crediting of a theoretical amount as payment of a debt constitutes an impairment of the obligation of the mortgagor-mortgagee contract.

NOTES

Application of Attractive Nuisance Doctrine to Injuries Occurring Inside Buildings

In a majority of the jurisdictions of the United States the question of the validity of the attractive nuisance doctrine is no longer open to argument. In view of the material already written in support of, or in opposition to, the theories on which the doctrine is based,[1] such theories need be discussed here only insofar as they are directly related to the specific problem of whether an owner is liable to a child suffering injury within his building. Under the circumstances, therefore, it is expedient to accept the suggestion of Professor Hudson that the doctrine be accepted as a rule of law in itself, rather than as an exception to the rule relieving the landowner from liability to trespassers and bare licensees.[2] The problem may thus be resolved into a consideration of whether the basis of the rule of the so-called turntable cases is sufficiently strong to support such an application of the doctrine as that under discussion.

It has often been stated that the modern tendency is to restrict the application of the rule,[3] and some courts have refused to apply it beyond the actual turntable situation.[4] In view of this tendency towards restriction, it seems probable that the courts would view an attraction enclosed within a building in a different light from one exposed in the open air. Few courts, however, have mentioned any such distinction, and most of the cases in which it has been made could have been decided on grounds equally applicable to cases where the object complained of was out of doors.

24. Italics supplied. Beaver County B. & L. Ass'n v. Winowich, 323 Pa. 483, 507, 187 Atl. 481, 492 (1936).

25. Pennsylvania Co. for Insurances on Lives, etc. v. Scott, Phila. C. P. Ct. No. 1, Phila. Legal Intelligencer, Oct. 23, 1937, p. 1, col. 6.

1. For some of the better discussions of the attractive nuisance doctrine in general, see Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort* (1923) 21 MICH. L. REV. 495; 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.

2. See Hudson, *supra* note 1, at 828; Note (1919) 89 CENT. L. J. 355.

3. Southern Cotton Oil Co. v. Pierce, 145 Ga. 130, 88 S. E. 672 (1916); Harris v. Cowles, 38 Wash. 331, 80 Pac. 537 (1905); Smith, *supra* note 1, at 446.

4. Southern Cotton Oil Co. v. Pierce, 145 Ga. 130, 88 S. E. 672 (1916); Howard v. St. Joseph Transmission Co., 316 Mo. 317, 289 S. W. 597 (1926); Harris v. Cowles, 38 Wash. 331, 80 Pac. 537 (1905).

In *Southern Cotton Oil Co. v. Pierce*[5] an eight year old child entered the open door of a seed house located in a public place, and while playing within the house was injured by contact with a noiselessly revolving, unguarded and partially concealed conveyor. The court denied recovery under the attractive nuisance doctrine on the ground that it had never been extended in Georgia beyond the turntable cases. It went on to say, however, that the doctrine should not be applied to useful machinery in an enclosed building, even though the doors are often left open. This dictum is given some support in *Pennington v. Little Pirate Oil & Gas Co.*,[6] in which the plaintiff, who sought to recover for the death of his son, was employed to operate pumping machinery in an enclosed building. He occasionally permitted his oldest son to turn off the power, but in this instance the oldest son was accompanied by his younger brother who had been warned not to go near the machinery. The child disobeyed and was caught in the machinery and killed. In denying recovery the court held that the machinery was not especially attractive and that it could not have been better guarded. The court's reliance upon the dictum in *Southern Cotton Oil Co. v. Pierce*[7] is weakened by the fact that it distinguished but did not overrule a prior decision in which the turntable doctrine was extended to the inside of a shed.[8] In Georgia, however, the dictum has been considered by the Court of Appeals as a holding and has been applied as a rule of law.[9] Iowa has also made the distinction based upon the enclosure of the machinery within four walls, but it has not placed its decision solely on that ground. In *Brown v. Rockwell City Canning Co.*,[10] recovery for an injury incurred within a building was sought specifically on analogy to the attractive nuisance cases. The court held that there was no analogy because the machinery by which the boy was injured was inside a building, but also held that in any event there was no negligence on the part of the company, since the machinery could not have been better guarded without interfering with its proper use. The decision of the court in *Hart v. Mason City Brick & Tile Co.*[11] is more strongly in support of the rule that the doctrine does not apply inside a building, but the decision emphasizes the fact that there was no implied invitation to the child to enter nor any allurement other than an open door. It may be concluded from the foregoing discussion that while the mere existence of the alleged nuisance within a building has been asserted as a controlling distinction, such a view is not widespread, and is more properly to be considered as a factor to which weight should be given but which is not conclusive. When it is viewed in this light no new element is introduced into attractive nuisance law, for the location and accessibility of the object has always been considered an important factor.[12]

While the enclosure of the attraction within a building is not considered in most jurisdictions as being *per se* an insurmountable obstacle to the application of the doctrine, it is apparent that such an enclosure may vitally affect the existence of other basic factors necessary to the application of the rule. Thus under the decision of the Supreme Court of the United States in *United Zinc & Chemical Co. v. Britt*,[13] the requirement is set forth that the child actually be attracted on to the property by the injurious object. This requirement would eliminate automatically a majority of the cases which would normally involve an extension

5. 145 Ga. 130, 88 S. E. 672 (1916).
6. 106 Kan. 569, 189 Pac. 137 (1920).
7. 145 Ga. 130, 88 S. E. 672 (1916).
8. Smith v. Marion Fruit Jar & Bottle Co., 84 Kan. 551, 114 Pac. 845 (1911).
9. Haley Motor Co. v. Boynton, 40 Ga. App. 675, 150 S. E. 862 (1929).
10. 132 Iowa 631, 110 N. W. 12 (1906).
11. 154 Iowa 741, 135 N. W. 423 (1912).
12. See United Zinc & Chemical Co. v. Britt, 258 U. S. 268 (1922), 36 A. L. R. 28 (1925); Green, *supra* note 1, at 521; Note (1919) 89 CENT. L. J. 355.
13. 258 U. S. 268 (1922), cited *supra* note 12.

of the doctrine to cover an injury incurred within a building since the child could not be drawn upon the property by the attractiveness of an object concealed within four walls. Thus where a boy and his companion were in the habit of riding on defendant's freight elevator without his knowledge, and the boy was injured while operating the elevator, recovery on the ground of the negligent maintenance of an attractive nuisance was denied on the authority of the *Britt* case.[14] This decision states no reason for the presence of the boys within the building, leaving only the inference that they were there for their own pleasure to be derived from some attraction within. Therefore, the court seems to hold, in effect, that an attraction, the existence of which is known from past experience but which is not presently visible, is insufficient to support recovery. It has also been held that the mere fact that children were fond of congregating in a building does not make it an attractive nuisance without a showing that they entered because of some definite attraction.[15] In some instances, however, the dangerous element is shown to have been visible through a door or other opening in the building, and the *Britt* case presents no obstacle. In such situations the courts usually recognize the applicability of the doctrine, and confine their discussion to a determination of whether the rule applies under the existing facts.

That the courts may vary considerably in their interpretation of the facts of particular cases may be illustrated by a comparison of *Hayko v. Colorado & Utah Coal Co.*[16] with *Krachanake v. Acme Mfg. Co.*[17] In each case dynamite caps were stored in a mining shack the door of which was left open. In the *Hayko* case the dynamite was loose on the floor and the plaintiff was injured while playing with it on the premises, while in the *Krachanake* case the explosive was in a box on a high shelf and the plaintiff was not injured by it until he had taken it home. The Colorado court in the *Hayko* case denied recovery on the ground that the shack itself was not an attraction, and that the dynamite caps, being inside the shack, could not tempt the boy to trespass. The North Carolina court in the *Krachanake* case allowed recovery on the ground that it was negligence to keep explosives in an exposed place near which boys were in the habit of passing since there is nothing so attractive to them as explosives. While these cases involved an attractive object within a building, there is dictum in another case to the effect that if leaving the door of a building open was negligence and an enticement to children, the owner would be liable for injuries to a trespassing child resulting from the condition of the building.[18] It may be noticed that in cases where recovery is allowed within the limitation imposed by *United Zinc & Chemical Company v. Britt*,[19] emphasis is laid upon the fact that the negligence is not only in maintaining the "nuisance", but in rendering it accessible to trespassing children.

There is considerable authority, however, in conflict with the limitation of the *Britt* case and in favor of the view that the basis of the doctrine is the owner's ability to anticipate the presence of the child,[20] and that the attraction is important only to the extent that it affects his ability so to anticipate.[21] Under this view

14. Silver King Coalition Mines Co. v. Lindseth, 19 F. (2d) 221 (C. C. A. 8th, 1927).

15. Giannini v. Campodonico, 176 Cal. 548, 169 Pac. 80 (1917) (child invited by stableman).

16. 77 Colo. 143, 235 Pac. 373 (1925).

17. 175 N. C. 435, 95 S. E. 851 (1918).

18. See O'Connor v. Brucker, 117 Ga. 451, 453, 43 S. E. 731, 732 (1903).

19. 258 U. S. 268 (1922).

20. Hardy v. Missouri Pac. Ry., 266 Fed. 860 (C. C. A. 8th, 1920); Nelson v. Lake Mills Canning Co., 193 Iowa 1346, 188 N. W. 990 (1922); Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 121 S. W. 326 (1909); HARPER, TORTS (1933) § 93; RESTATEMENT, TORTS (1934) § 339.

21. Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 121 S. W. 326 (1909); Hogan v. Etna Concrete Block Co., 325 Pa. 49, 188 Atl. 763 (1936). See Hudson, *supra* note 1, at 850; Green, *supra* note 1, at 521.

recovery has been allowed where the child entered the building through curiosity and after a warning to stay out by third persons,[22] where children played about the property with the knowledge and consent of the owner,[23] where the child was apparently a business guest,[24] and in a case where the infant plaintiff was an employee.[25] Since the rule of the early turntable cases has been said to have created a duty upon the owner to protect trespassing children, through the fiction that the maintenance of the attractive object was an implied invitation,[26] it would seem to be applicable only to cases of trespassers and bare licensees, a duty of reasonable care being already imposed for the protection of invitees.[27] The view that the basis of the duty is the ability of the landowner reasonably to anticipate the injury to the child would seem to eliminate as a factor the status of the infant as a trespasser, licensee or invitee.[28] Support for the proposition that the *Britt* limitation, and not the reasonable anticipation theory, represents the departure from the first cases on the subject is found in the early case of *Sioux City R. R. v. Stout*:[29] "If from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff." While this case involved a trespasser and was based partly, at least, on the fact that the landowner had reason to expect the presence of children, the reasoning is of even greater weight in support of a view allowing recovery where the defendant had actual knowledge of their habitual presence.[30] An advantage of the latter theory is that it extends protection to children who, being lawfully upon the premises, are injured by contact with an object normally harmless to adults, but dangerous to persons of immature discretion. In *Hillerbrand v. May Mercantile Co.*,[31] a department store maintained an escalator driven by a moving cable which was covered by a box at the point where it ran under the floor. The plaintiff, while her mother was otherwise occupied, put her hand through an opening in the box and was injured. The court held that it was negligence not to anticipate that the cable and opening would attract the curiosity of children and not to take proper precautions for their safety. In a New York case a child who was injured by putting his finger in a coffee grinder was denied recovery on the ground that the appearance of the machine was not such as to attract a child of plaintiff's age, and on the ground that there was no proof that any usual or customary guards had been omitted.[32] The question arises, however, as to whether this class of cases may properly be considered as having been decided on the basis of the attractive nuisance doctrine.

In *Hogan v. Etna Concrete Block Co.*,[33] the Pennsylvania Supreme Court stated the attractive nuisance doctrine of that jurisdiction to be that if children are wont to go on the premises for play or other purposes, and the owner maintains attractive appliances or artificial conditions which create a danger, he is legally bound to use ordinary care. In a more recent case involving an injury

22. Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289, 42 S. W. 959 (1897).
23. Jensen v. Wetherell, 79 Ill. App. 33 (1898).
24. Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 121 S. W. 326 (1909).
25. Smith v. Marion Fruit Jar & Bottle Co., 84 Kan. 551, 114 Pac. 845 (1911).
26. HARPER, TORTS (1933) § 93; Smith, *supra* note 1, at 355.
27. HARPER, TORTS (1933) §§ 97, 98.
28. But see Stamford Oil Mill Co. v. Barnes, 103 Tex. 409, 128 S. W. 375, 376 (1910).
29. 17 Wall. 657 (U. S. 1873).
30. See Cooke v. Midland Great Western Ry. of Ireland, [1909] A. C. 229.
31. 141 Mo. App. 122, 121 S. W. 326 (1909).
32. Connelly v. Carrig, 244 N. Y. 81, 154 N. E. 829 (1926). In Pfannenstiel v. Luckey, Platt & Co., 227 App. Div. 633, 235 N. Y. Supp. 733 (2d Dep't, 1929), the dissenting opinion applies the doctrine to a case where a child was attracted to, and injured by, an unguarded demonstration washing machine in defendant's store.
33. 325 Pa. 49, 188 Atl. 763 (1936).

to a boy within a building when a chain hoist broke which he was voluntarily assisting employees to operate, the same court declared that the doctrine had never been held applicable to the interior of buildings in Pennsylvania, and that it was unnecessary to consider the question in the case at bar because the hoist did not induce the boy to enter the building. Nevertheless, the court held that there was a duty upon the defendant to use reasonable care for the safety of children frequently visiting its plant.[34] In spite of its denial that it was applying the attractive nuisance doctrine, the court was plainly applying the principles of the *Hogan* case to the interior of buildings.

While there is some authority against the extension of the attractive nuisance doctrine to cases where the injury was incurred within a building, most courts seem willing to apply it when there is proof that the plaintiff was actually attracted by the dangerous object, and many courts will allow recovery when the owner should reasonably have anticipated that children might be injured by it. The latter theory, as accepted by the Restatement, would seem to be the more desirable view. It requires that the place be one where the presence of children is known or should be known, that there be an unreasonable risk of serious harm to such children, that the children because of their youth do not realize the danger, and that the utility to the owner of maintaining the dangerous condition is slight compared to the risk to the children.[35] The owner is thus protected by the requirement of reasonableness, from the danger arising from the fact that every object is a potential attraction, and the troublesome question of whether the child was on the premises because of the attraction or for some other reason is rendered immaterial. The application of the rule to injuries within buildings creates no more difficulty, under this view, than its application outdoors, so that a class of cases indistinguishable in the cause and effect of the injury from the customary attractive nuisance cases, should not be distinguished on the presence of an additional but immaterial factor.

R. L. F.

34. Weimer v. Westmoreland Water Co., 193 Atl. 665 (Pa. Super. 1937).
35. RESTATEMENT, *op. cit. supra* note 20.