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NEGLIGENCE — ESCALATOR NOT AN ATTRACTIVE NUISANCE — Plaintiff, a four-year-old child, accompanied his mother into defendant’s department store. Having wandered over to a nearby escalator, he inserted his hand into the aperture where the steps go under the floor, and suffered the loss of two fingers for which injury this action was brought. Held, defendant’s motion to dismiss the action was properly granted below, since an escalator, being an ordinary, common instrumentality constructed for ordinary and common use, is not an attractive nuisance. Kataoka v. May Department Stores Co., (D. C. Cal. 1939) 28 F. Supp. 3.

The court in the principal case referred to an earlier Missouri case,1 where on almost identical facts an escalator was said to be an “attractive nuisance.” 2 The court flatly refused to follow the Missouri decision, although it did not indicate any grounds for such refusal, aside from the general statement that it was precluded from so doing under the California decisions.3 It is to be noted that the legal approach differs in the two cases in one significant respect. The principal case, without classifying the plaintiff as trespasser, licensee, or invitee, denied the applicability of the attractive nuisance doctrine on what may be called the general principles of the doctrine. The Missouri court, on the other hand, stated that the child was in the store by invitation and thereby a duty was created.4

1 Hillerbrand v. May Mercantile Co., 141 Mo. App. 122, 121 S. W. 326 (1909).

2 There have been several other cases involving injuries to infants resulting from escalators. Conway v. Boston Elevated Ry., 255 Mass. 571, 152 N. E. 94 (1926); Cook v. Boston Elevated Ry., 256 Mass. 27, 152 N. E. 58 (1926). In these two Massachusetts cases no mention at all was made of the attractive nuisance doctrine, the cases being decided on general principles of negligence. Hardy v. Central London Ry., [1920] 3 K. B. 459, held that an escalator is not an attractive nuisance, but that case was decided on principles which differ in many respects from the doctrine generally followed by American courts.

3 Since there were no California decisions directly in point, the court was not bound by the rule of Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938); but it chose to follow the trend of the California decisions as indicated by dicta in related cases.

4 “When extended in favor of trespassing children, the rule has been criticized on the ground that the proprietor is under no duty to keep his premises safe for trespassers, whether they be children or adults. This criticism does not concern us in the present case, as plaintiff was in the store by invitation, and it is unquestioned law that a person
Of course, if the child is an invitee, there is no need to even discuss the doctrine.\(^5\) The attractive nuisance theory is employed to create a duty on an owner of premises where none would otherwise exist.\(^6\) However, if the child is an invitee, then there is a duty as to any other invitee to use due care in keeping the premises safe; and in considering what constitutes “due care under the circumstances,” the ways of young infants will necessarily be considered. Recognizing that the Missouri case and the principal case are in conflict, the result of the principal case is to be commended, even though the court’s reasoning is not entirely clear.\(^7\)

The court’s chief contention is that an escalator is built “not as an uncommon and dangerous instrumentality, but as a safe instrumentality for ordinary use.”\(^8\) This expresses the modern tendency to further limit the applicability of the doctrine. From the very first, courts which accepted the doctrine applied certain limitations.\(^9\) In speaking of the usefulness of the instrumentality to the owner, the court recognizes that the foundation of the whole attractive nuisance doctrine is not “implied invitation,” creation of a “trap,” or “sic utere tuo ut alienum non laedas;”\(^10\) but that the true basis is a balancing of two conflicting social interests—the protection of children and the desire of the owner to use the

who invites children on his property is liable if he has not used due care to provide for their safety.” Hillerbrand v. May Mercantile Co., 141 Mo. App. 122 at 133, 121 S. W. 326 (1909).\(^5\)

\(^5\) 45 C. J. 771 (1928); 5 Ore. L. Rev. 333 at 334 (1926). But see Angelier v. Red Star Yeast & Products Co., 215 Wis. 47, 254 N. W. 351 (1934).

\(^6\) The normal rule is that there is no duty, to use the due care under the circumstances, towards trespassers and “bare” licensees, whether they be children or adults. An exception to the general rule is where defendant keeps an attractive nuisance on his premises. In such cases, a duty is imposed towards infants likely to be attracted. THOMPSON, NEGLIGENCE 937-938 (1901); COOLEY, TORTS, Throckmorton ed., 675-676 (1930); 36 A. L. R. 34 at 38 (1925).

\(^7\) The court states that an escalator “is not artificial, uncommon, or dangerous,” and is not therefore an attractive nuisance. This statement frequently appears, especially in California decisions upon which the court in the present case relies. See Morse v. Douglas, 107 Cal. App. 196, 290 P. 465 (1930); Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993 (1931). But an accurate and precise definition of “artificial” is nowhere given. In common usage, the word is the antithesis of “natural.” But if an escalator is not “artificial,” then does “artificial” in this sense mean any more than “uncommon?”\(^8\)

\(^8\) Principal case, p. 7.

\(^9\) Some courts insist that the danger be latent. Erickson v. Minneapolis, etc., R. R., 165 Minn. 106, 205 N. W. 889 (1925); Riggle v. Lens, 71 Ore. 125, 142 P. 346 (1914). The doctrine is generally held not to apply to natural conditions. Harper v. City of Topeka, 92 Kan. 11, 139 P. 1018 (1914). It is also held not applicable to common objects or instrumentalities. Heva v. Seattle School District, 110 Wash. 668, 188 P. 776 (1920); Edmond v. Kimberly-Clark Co., 159 Wis. 83, 149 N. W. 760 (1914). Followed by many courts is the rule of United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299 (1922), where Justice Holmes states that the infant must have been attracted onto defendant’s premises by the very instrumentality or condition which caused the injury.

\(^10\) Smith, “Liability of Landowners to Children Entering Without Permission,” 11 HARV. L. REV. 349, 434 (1898), discusses and criticizes the various theories upon which liability has been imposed.
Some means of conveyance from floor to floor is essential. No one would suggest that an ordinary stairway is an attractive nuisance simply because there is a risk created to those children who may be tempted to slide down the bannister. Some allowance must be made for progress. What was extraordinary a generation ago is a practical necessity today. The ordinary stairway is becoming outmoded; it has been replaced by moving conveyors, such as escalators. Therefore, where the usefulness of such instrumentality overshadows the comparatively slight risk to infants which may be involved, there should be no liability aside from that predicated on general rules of negligence.

11 Bohlen, Studies in the Law of Torts 191 (1926); Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 P. (2d) 369 (1932).