

THE DUTY OF A LANDOWNER TOWARD THOSE ENTERING HIS PREMISES OF THEIR OWN RIGHT.

II

To determine what duty if any a landowner owes to a fireman or police officer coming on his land in the performance of his duty, it is necessary to examine the whole subject of the obligations of owners to all those persons who come on his premises, by their own wrong or of right, whether derived from the owner's consent or independent of it.¹

The decisions as to a landowner's liability to persons injured on his property group themselves into two classes: those in which the injuries are caused by the owner's acts and those caused by the condition of his premises. In both there is a gradual but persistent weakening of the original concept that the owner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain. The King's law stopped at the boundary of the owner's sovereign territory except in felonies and in trespass actions, which were originally punitive and extensions of the appeals for felonies to violent misdemeanors. When the comparatively modern law of negligence reached the relations of landowners to persons entering his property it found the field occupied by this concept of the owner's right as sovereign to do what he pleased on or with his own property. The history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners.

The segregation of highway robbery from all other forms of violent theft and the King's peculiar jurisdiction over offences committed in the vicinity of his person, and so within his personal peace, points to a time when his authority stopped at the boundaries of the innumerable local and feudal jurisdictions which covered England. But the power of the crown to punish felonies even though committed within such jurisdictions is as ancient as our records.

¹ 69 U. of Pa. L. R. 147.

The writ of trespass was itself an exhibition of the growing power of the crown. It followed closely the general features of the appeal of felony. By it the crown asserted its power to punish those violent misconducts which threatened the good order of the realm, but did not fall within any of the felonies punishable by appeal. In its origin, like the appeal of felony to which it was a supplement, it was punitive and in that sense criminal, and it naturally followed that the crown's jurisdiction in trespass like its jurisdiction in felony extended to trespasses committed even within the peculiar jurisdiction of the mightiest noble. Therefore, the privilege of a landowner to do what he pleased on his own land, subject if he were lord of a manor only to such redress as might be obtained from his own court, was to this extent curtailed, and even his privilege to use force in the defence of his privacy became subject to the scrutiny and control of the King's Justices. So when the writ of trespass lost its early punitive and criminal character, and became a writ by which an individual aggrieved by unlawful force could recover damages by way of compensation for the injury done him, a right of action in trespass was consistently sustained where the landowner's action was intended to inflict injury or had that quality which in criminal law is regarded as a legal equivalent, wanton or wilful disregard of the injured person's safety.

Thus from the fact that the writ of trespass, while it was in its essence criminal, included in its scope offences committed by a landowner upon his own premises, appears to have come the usual form of statement of a landowner's liability for injuries inflicted upon his trespassers by his own acts. In all but a few jurisdictions, the owner's liability is stated in terms which require the existence of a substantially criminal state of mind.² The phraseology differs, but

²So Knowlton, C. J., in *Aiken v. Holyoke Street Ry.*, 184 Mass. 269 (1903) says of wanton and wilful wrongdoing, such "conduct is criminal or quasi criminal. If it results in the death of the injured person, he "(the person guilty of it) "is guilty of manslaughter." "That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness."

in all require only that the landowner shall not inflict intentional, wanton or wilful injury upon a trespasser.³

In some few jurisdictions, of which Massachusetts is perhaps the most important and typical, these requirements are from time to time stated as though they were universally essential. And while the actual cases do not require the court to define what constitutes that wilful or wanton wrongdoing which will make a landowner liable to a trespasser, the term is fully defined by it in other actions where a distinction is drawn between the extent of liability for such misconduct and mere negligence. As so defined not only must the act be intentional but there must be actual or "constructive intention as to the consequences;" "A reckless disregard of probable consequences" which makes the intentional act, "otherwise mere negligence," "a wilful wrong."⁴

In both Massachusetts⁵ and New York⁶ an owner has been liable to a trespasser "where," as Holmes, J. said in

³ "The owner of property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him, otherwise a man trespasses at his own risk,'" Hamilton, L. J., *Latham v. R. Johnson and Nephew*, L. R. (1913) 1 K. B. 389, 411. In *Nashville Ry. v. Priest*, 117 Ga. 767, (1903) the owner is said only to be liable for conduct amounting to "a reckless, wilful and wanton disregard of the trespasser's safety." In *Scheffer v. Sauer Co.* 238 Pa. 550 (1913), it was said that the owner's only duty toward a bare licensee, who, in this jurisdiction, is often said to stand in no better position than a trespasser, "was to abstain from inflicting on him an intentional wanton or wilful injury." In *Hoberg v. Collins Lavery & Co.*, 80 N. J. L. 425, (1910), *Vorhees, J.*, said, p. 428 "as against a trespasser a malicious or intentional injury is actionable while a merely negligent act will not form the basis of recovery because the duty to observe reasonable care is not owing to a trespasser" and p. 429: "That a defendant might reasonably have anticipated a possible injury to a trespasser plays no part in determining wilfulness." See also *Magar v. Hammond*, 183 N. Y. 387 (1906); *O'Brien v. Union Freight R. R.*, 209 Mass. 449 (1911); *Maynard v. N. & M. R. R.*, 115 Mass. 150 (1874).

⁴ *Aiken v. Holyoke*, 184 Mass. 269 (1903) per *Knowlton, J.*, but see *Bolin v. Chicago etc. R. R.*, 108 Wis. 333, (1900) in which *Marshall, J.*, says, p. 352, "The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of the belief that such other either contemplated producing it, or being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences;" accord *Hoberg v. Collins Lavery & Co.*, 80 N. J. L. 425 (1910). In these cases the plaintiff was a boy injured by being thrown or driven from a car in which he was trespassing.

⁵ *Palmer v. Gordon*, 173 Mass. 310 (1899). The plaintiff with some other boys had disregarded the orders of the defendant (a restaurant keeper) to leave his kitchen into which they had intruded. He drew a pan of scalding water across the stove, in order to spill to on the stove and frighten the boys,

the Massachusetts case, "although not specifically contemplating actual damage, (the owner) did an act specifically contemplating the plaintiffs presence and directed against him" and which "sufficiently and clearly threatens the danger which it brings to pass."⁷ While this statement indicates that the act must be actuated by a purpose to affect the trespasser, as in both cases by frightening him, and thus evidencing at least a sort of hostility towards him, it is not improbable that an act done with knowledge of the trespassers presence under circumstances which clearly indicate an obvious probability of injury to him would be held to constitute wanton disregard for his safety, though not directed against him or actuated by any purpose towards him, but done for the purpose of furthering the owner's own use of his land.⁸ And even in Massachusetts there are inti-

and some of the water spilled on the plaintiff, scalding him. While Holmes, J., in one sentence of his opinion says, "that he (the owner) may make himself liable to a trespasser by an act that has reference to trespasser's presence, etc." it seems clear that the phrase "has reference to" is not equivalent to "with knowledge of" but requires that the act be done because of the presence of the trespasser, either known to the owner or obviously expected by him, as in the "Spring gun" cases, *Bird v. Holbrook*, 4 Bingham 628 (1828); *Hooker v. Miller*, 37 Iowa, 613 (1873); *Grant v. Hass*, 31 Tex. Civ. App. 688 (1903); *State v. Barr*, 11 Wash. 481 (1895); and see *Scheurman v. Scharfenberg*, 163 Ala. 337 (1909) where the person injured was not merely a trespasser but a burglar, whom the owner, had he been present, might have shot to protect his home.

Magar v. Hammond, 183 N. Y. 387 (1906). The defendants were a Mr. Hammond and his servant, Tompkins, employed to guard his fish pond, who had shot the plaintiff who was poaching. Tompkins denied that he had fired at the plaintiff, asserting that he had fired into the air to frighten him. Cullen, C. J. held that, "Neither Tompkins nor his master was liable for the accidental discharge or merely negligent discharge of his rifle. If, on the other hand, being aware that the plaintiff or other human beings, was on the bank of the pond, Tompkins shot the plaintiff wilfully, intending to hit him or some human being, or if, without intending to hit the plaintiff or any human being, he recklessly or wantonly shot where he had good reason to believe there were human beings, then he is liable for the injury caused to the plaintiff."

⁷ But see *Bolin v. R. R.*, 108 Wis. 333 (1900) and *Hoberg v. Collins, Lavery & Co.*, 80 N. J. L. 425 (1910) in which it is required that the injury must be so obviously likely to occur that the deliberate act of creating the danger amounts to wilfulness."

⁸As in *Walsh v. Pittsburgh Railways Co.*, 221 Pa. 463 (1908). The plaintiff, a girl of nine, was injured while in the company's premises. She was standing near to a cable which the company's engineer must have known was frayed. The engineer passed close by her as she was so standing, entered the motor house and started the motor setting the cable in motion. A frayed strand of the cable caught the plaintiff's dress and dragged her into the drum. It was held that "there was a duty not to injure her (a trespasser) intentionally or wantonly by any act to expose her to danger" and that "whether he (the engineer) actually saw her and was conscious that his act exposed her to danger" were questions for the jury.

mations that special care must be taken by those driving railway engines to avoid running down even a trespasser or bare licensee⁹ if he is seen in helpless peril.¹⁰

But in the majority of jurisdiction, the court, while still adhering to the traditional form of stating the owner's liability, in practice permits recovery where the owner, after discovering the presence of the trespassers, has failed "to use proper care,"¹¹ or "to use reasonable and proper care to save and protect them (the trespassers) from the probable consequence of their indiscretion or negligence."¹² And the failure to exercise proper care, after discovery of the trespasser's presence and his peril, is said to show the reckless disregard for his safety and so to constitute wilful, wanton wrong.¹³ Yet the standard of care required of an owner observing the helpless peril of a trespasser is indistinguishable from that required of any person carrying on the same activities at a point where both he and the person in peril have an equal right to be.

There have been but few cases in which a trespasser has sought to recover for injuries inflicted by an owner in the conduct of his ordinary private affairs upon his own property.¹⁴ The usual case is one in which trespassers upon a railway right of way have brought actions to recover damages for injuries caused by the failure of the engineer of the

⁹ As will be later seen in Massachusetts no distinction is made between trespassers and bare licensees, and tolerated intruders.

¹⁰ See *Chenery v. Fitchburg R. R.*, 160 Mass. 211 (1893) and *June v. Boston and Albany R. R.*, 153 Mass. 79 (1891); in both cases the opinions are by Holmes, J., who wrote the opinion in *Palmer v. Gordon*, *supra* note 5.

¹¹ *Studley v. St. Paul & Duluth R. R.*, 48 Minn. 249 (1892)

¹² *Anderson v. Chicago St. Paul etc. R. R.*, 87 Wis. 195 (1895), with which compare *Bolin v. R. R.*, 108 Wis. 333 (1910); note 4 *supra*. *Accord*: *St. Louis, etc. R. R., v. Townsend*, 69 Ark. 380 (1901); *Gonza v. Texas Mexican R. R.*, 41 S. W. 172 (Tex. Civ. App. 1897); *Mathews v. Chicago etc. R. R.*, 63 Mo. App. 569 (1895); *B. & O. R. R., v. Welch*, 114 Md. 536, (1911).

¹³ *Sheedan v. St. Paul & Duluth R. R.*, 45 U. S. App. 498 (C. C. A. 7th circuit, 1896); *Taimer v. Louisville & Nashville R. R.*, 60 Ala. 621 (1877); *Haley v. Kansas City etc. R. R.*, 113 Ala. 640 (1896); *Martin v. Chicago etc. R. R.*, 194 Ill. 138 (1902); *Kronzer v. Pittsburgh C. C. & St. L. R. R.*, 151 Ind. 587 (1898); *Rosenthal v. N. Y. etc. R. R.*, 112, App. Div. 431 (N. Y. 1906).

¹⁴ *Palmer v. Gordon*, *supra* note 5; *Magar v. Hammond*, *supra* note 6; *Walsh v. Pittsburgh Rys.*, *supra* note 8; *Herrick v. Wixon*, *infra* note 17; *Rome Furnace Co. v. Patterson*, 120 Ga. 521 (1904), *infra* note 18.

train to stop it in time to avoid running him down.¹⁵ In such cases, the care which the engineer must exercise to avoid the imputation of wanton and wilful misconduct after discovering the helpless peril of the trespasser is substantially the same as that which, to stand clear of mere negligence, the motorman of a trolley car must exercise when he observes a traveller in a similar peril upon that part of the highway over which the traction company's line is laid. Yet in the first case, the intruder upon the railway's right of way is as much a trespasser as one who comes of his own motion into a gentleman's country seat or into a manufacturing plant, while in the second case, the traveller, as a member of the public, has a right upon the highway inferior to that of the company only in so far as the need of rapid transit may require him to yield the right of way to the company's cars. In both cases, the engineer or motorman having the right of way (one because as owner the railroad is entitled to insist upon intruders giving way to its use of its own land, the other because of the necessity of rapid transit and because the traction company's cars can travel only upon its tracks requires other traffic to yield to them) may assume, until there is proof to the contrary, that a mere waning to get off the tracks will be effective in removing the trespasser or traveller from the path of the engine or car. In each case, therefore, he need not slacken speed nor take any particular precautions to have his engine or car under peculiar control until there is something to indicate that the intruder or trespasser either does not hear the warning or is unable to obey it. But once he observes facts which ought to indicate to him that this is so, the engineer is as fully bound

¹⁵ See cases cited in notes 11, 12 and 13. It is curious to note that there is no English case of this sort, see "The Fourth Dimension" by Rudyard Kipling. In his dissenting opinion in *Murphy v. Wabash R. R.*, 228 Mo. 56, (1910), Woodson, J., pp. 108 *et seq.*, presents some startling statistics showing the appalling number of trespassers killed or injured every year upon railroads rights of way and particularly the excessive frequency of such casualties in Missouri, which he suggests is due to what he regards as the undue consideration which Missouri courts require railroads to show to such trespassers and to the so called "humanitarian" extension of the "last clear chance" doctrine, in dealing with the effect of a trespass considered as contributory negligence.

as is the motorman to take every step necessary to avoid running down the trespasser or traveller.

In some jurisdictions, the traditional form of statement is completely abandoned; so in *Buch v. Amory*,¹⁶ *Carpenter, C. J.*, says of landowners duties to known trespassers: "They are bound to abstain from any other and further intentional or negligent acts of personal violence—bound to inflict on him by means of their own active intervention no injury which by due care they can avoid," and in *Herrick v. Wixon*,¹⁷ *Montgomery, J.*, says: "Every instinct of humanity revolts from the suggestions that after the presence of the trespasser was known, the question of whether a dangerous experiment shall be attempted in his presence or whether an experiment shall only be conducted with due care for his safety, can not be made to depend upon whether he has forced himself into the owner's premises."¹⁸

Passing to the owner's liability for injuries inflicted by his acts upon a bare licensee, (i. e. one who comes, whether at his own or the owner's suggestion, upon the premises for his own purposes, the owner having no interest in his visit)

¹⁶ 69 N. H. 257 (1897) p. 260.

¹⁷ 121 Mich. 384 (1899), p. 388; the plaintiff had crept under the flap of the tent into the defendant's circus and was injured by a giant cracker set off by a clown. On page 389 the court says on rehearing; "the plaintiff, together with all others attending the performance, had the right to assume that the defendant would exercise due care, proportioned to the consequences which would be likely to arise from a failure in its exercise, to provide against dangerous explosives."

¹⁸ In *Rome Furnace Co. v. Patterson*, 120 Ga. 521 (1904), it was held that, if the defendant knew of the plaintiff's presence in his blacksmith shop, he would be liable to him, though no facts "were alleged in the declaration from which it could be inferred that he was even a licensee in the shop" for injuries due to an explosion of dynamite, not intentionally caused but due to the folly of an employee in blowing up the fire while the can of dynamite was standing on the side of the forge. *Fish, C. J.*, while reversing a judgment for the plaintiff on demurrer on the ground that the declaration contained no sufficient allegation that the defendant knew of the plaintiff's presence in his shop, held p. 523, that "even as a trespasser, he (the plaintiff) would have a right to recover for any injuries sustained by him in consequence of the defendant having negligently and recklessly set in motion any destructive agency, the natural tendency of which would be to imperil his life, if at the time of such negligent and reckless act the defendant knew or ought to have known that he was likely to be injured thereby." Here as in *Herrick v. Wixon*, the defendant was dealing with a highly dangerous substance, but while in *Herrick v. Wixon* as in *Walsh v. Pittsburgh Ry.*, *supra* note 8, the defendant intended to set the dangerous force in motion, in *Rome Furnace Co. v. Patterson* the defendant clearly had no such intention, his fault being unintentional negligence.

the English Courts, which appear to have adhered rigidly to the traditional liability of an owner towards a trespasser¹⁹ hold that while a licensee takes the risk of the physical condition of the premises yet he does not take the risk of dangers superadded by the active misconduct of his host.²⁰ No distinction is drawn between a bare licensee and a business guest. Nor is it necessary that the owner shall know of the licensee's presence to create a duty on his part to refrain from acts likely to harm him. While he is not bound to expect the presence of trespassers, though in fact there is a real probability of their intrusion, he is bound to expect that one to whom he has extended an invitation or permission will accept it and will visit his premises. It is immaterial what the purpose of the visit may be, whether for the sole benefit of the visitor or partly at least for the benefit of the owner. The important thing is that he has given his consent and therefore must take into account the probable presence of either licensee or invitee upon those parts of his property to which the invitation or permission applies. In either case, he is liable if he or his employees do any act which if they stopped to think they should realize would imperil the safety of the licensee if he avails himself of the permission granted him. It is extraordinary that a view so logical as this should not have received universal acceptance.²¹ It would seem that even the most ardent champion

¹⁹ See *Grand Trunk Ry. of Canada v. Barrett, L. R.*, (1911) A.C. 361 (Council).

²⁰ *Gallagher v. Humphrey*, 6 Law Times N. S. 684 (Q. B. 1862). "It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way," per Cockburn, C. J. See as to the liability of a Railway to a person of gratuitously but expressly invited to ride in its engine, for injuries caused by its careless operation, *Harris v. Perry, L. R.* (1903) 2 K. B. 219.

²¹ In the comparatively few cases where the plaintiff came on the premises by the owner's actual permission the English rule is followed in some jurisdictions. *DeHaven v. Hennessy Co.*, 137 Fed. 472 (C. C. A. 6th Circuit 1905); *Pomponio v. N. Y., N. H., R. R.*, 66 Conn. 528 (1895), where the Railroad had indicated its willingness to permit the employees of a neighboring factory to cross its tracks at a particular point by laying down planks, etc. And it has been applied in many jurisdictions to require Railroads to give signals of the approach of their trains and otherwise to exercise care in the management of their trains so as to avoid injuring persons at definite points where the public, without interference but without actual permission and to the knowledge of the railroad, are accustomed to cross. *Barry v. N. Y. Cent. R. R.*, 92 N. Y. 289

of the owner's right to do what he pleases upon his own property would concede that having chosen to admit others within it, the owner had voluntarily yielded a part of his privilege to do as he pleased thereon. Yet a number of American jurisdictions make no distinction even in respect to injuries caused by the active misconduct of owners between the merest of trespassers and those who come onto the land at the owner's express invitation or permission, so long as their visit is of no benefit to the owner.²²

In all probability, this unfortunate attitude is due to the high respect paid to the learning and ability of Chief Justice Bigelow of Massachusetts, who, in his opinion in

(1883); Taylor v. R. R., 113 Pa. 162 (1886); West. & Atl. R. R. v. Meigs, 74 Ga. 857 (1885); Mitchell v. R. R., 68 N. H. 96 (1894); Green v. R. R., 110 Mich. 648 (1896); Delaney v. R. R., 33 Wis. 67 (1873). There is much doubt as to the propriety of placing such duty, as the courts may choose to lay upon the Railroad under such circumstances, upon the ground that a "license" is to be "implied" from its failure to prevent such habitual trespass; see post p. But it would seem that those courts which take this view must recognize as high a duty to the actually though gratuitously invited or permitted visitor, as to the so called "licensee" by "implication" from the inaction of the owner.

²² Although in 1868 the Supreme Judicial Court of Massachusetts expressly followed Fallagher v. Humphrey in the case of Corrigan v. Union Sugar Refinery, 98 Mass. 577, (1868), it has been repudiated in later decisions, O'Brien v. Union Railroad, 209 Mass. 449 (1911) in which it was said that Corrigan v. Union Square Refinery "perhaps may stand on the ground of intentional or reckless injurious acts." It was early held in New York that a railroad must exercise care in running its trains over a permissive crossing, Barry v. N. Y. Central R. R., 92 N. Y. 289 (1883); and in DeBoer v. Brooklyn Wharf Co., 51 App. Div. 289 (N. Y. 1900), the same duty was laid upon an owner operating a private railway. But in Weitzman v. Barber Asphalt Co., 190 N. Y. 452 (1908), Werner, J., said pp. 456-7, "As to such persons (trespassers and bare licensees) the well settled rule is that the only duty of the own or occupants of the land is to abstain from inflicting intentional, wanton or willful injuries." The actual facts of the case did not require this statement, since the injury was caused by one of the ordinary operations of the defendant business, the defendant's alleged default being his failure to warn the boys of their danger. The case would seem to fall within the rule as stated by Wightman, J., in Gallagher v. Humphrey, *supra*, that "such a permission as is here alleged may be subject to a qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things of the ordinary nature of the business carried on." A licensee is not entitled to expect that any special preparation will be made for his reception or that the owner will interrupt his business to take special precautions for his safety. As Vann, J., said in Downes v. Elmira Bridge Co., 179 N. Y. 136, 142, (1904), "where one enters a place where work is going on and he knows the nature of the work and the condition of the place . . . he takes the risk of the operation of the workmen who cannot reasonably be required to give further notice than the situation itself affords. Dangerous work in plain sight is notice to a mere licensee," as indeed it is submitted it would be even to a person entering such a place on the owner's business.

Sweeney v. The Old Colony Railway,²³ divides the obligation of owners of land into two classes: toward those who came thereon by his invitation and those who came by his mere permission. His opinion made no distinction between the owner's duty to put his premises in safe condition for the visitor's use and his obligation to refrain from conduct thereon of a sort likely to harm the visitor, if he came there. The invited guest is entitled to protection in both respects. The merely permitted guest is entitled to no greater protection in either respect than a trespasser. This classification has yielded even in the jurisdiction in which it originated to the influence of the English decisions, which make the interest or lack of interest of the owner in the visit the criterion of the extent of the obligation owed by him. But unfortunately some courts still follow the subsidiary proposition laid down in Sweeney's case that an owner owes no duty to refrain from conduct, no matter how probably injurious it may be to licensees, which falls short of such wilful and wanton wrongdoing as would make him liable to a trespasser. While the term "licensee" has thus taken on an entirely new and different meaning, the owner's obligation to the new class now identified by this term remains as stated by Chief Justice Bigelow.

This whole question is, however, complicated by the difficulty of drawing the line between active misconduct and mere failure to prepare a place safe for the reception of the visitor or licensee. As will be seen, there is universally recognized a vital difference between the duty of a landowner to provide a safe place for the reception of these two classes. In particular cases, it is often difficult to determine whether the plaintiff's injury is due to active misconduct or to failure to put the premises in good condition.²⁴ Many of the cases in which it is stated that an owner owes no greater duty to a bare licensee than his traditional duty

²³ 92 Mass. 368 (1895).

²⁴ Compare *Barry v. N. Y. Cent. R. R.*, *supra* note 21, with *Nicholson v. Erie R. R.*, 41 N. Y. 525 (1870) and *Sutton v. New York Central R. R.*, 66 N. Y. 243 (1876).

to trespassers, are cases in which the licensee is injured by a condition caused by the owner's use of his property or by the work which is done thereon. The condition, though perhaps of recent origin, existed either when the permission to enter was given or when the licensee entered under it. These cases, it is submitted, are clearly cases where the owner's fault, if any, lay in failing to provide a safe premises for the reception of his guest. In other cases, and these are admittedly more difficult, the licensee is injured by acts of the owner or of his servants which are in themselves proper, but which are dangerous and cause injury because the appliances or machinery used are defective. Here also if the defect was now known to the owner, but could have been discovered by a reasonable inspection, it seems clear that the injury is due to an inadequate preparation, and there being no duty on the part of the owner to inspect his premises so as to put it in safe condition for a mere licensee, there can be no liability even under the English view. But where the owner knows that the appliance is defective, the case is more difficult. In strictness, it would seem that there is here not merely a failure to put the premises in good condition, but active fault in doing an act which when and as done is known to be dangerous because of the defective character of the instrument with which it is done.²⁵

And it must not be forgotten that one who accepts a gratuitous gift of a right to use another's premises, must realize that he must not only take them as he finds them, but also, if they are in active use for the owner's business purposes, that he cannot expect to find them free from such dangers as are inherent in such use, and just as he has no right to expect that the owner will go to any pains to prepare the premises as a place for his use, so he has no right to expect that he will alter or change his normal system of work for his protection.²⁶ Therefore he can not expect "special

²⁵ As in *Walsh v. Pittsburgh Rys.*, *supra*, note 8.

²⁶ See *Wightman, J.*, in *Gallagher v. Humphrey*, and *Vann, J.* in *Downes v. Elmira Bridge Co.* *supra* note 22 and *Holmes, J.* in *Metcalfe v. Cunard S. S. Co.*, 147 Mass. 66. (1888), and see *Rosenthal v. Beef Co.*, 101 N.Y.S. 532 (1906) and *Habina v. Electric Co.*, 150 Mich. 41 (1907).

precautions" for his protection.²⁷ It may therefore well be that an owner is not bound to warn possible or even probable visitors, though invited or expressly permitted, that he is about to do some perfectly proper act whose only danger lies in the possibility that the visitor will not be on the alert to avoid it. It is the visitor's duty to be on the lookout for such dangers as are incident to the owner's normal use of his land, not the owner's duty to give him notice.

But the principal source of difficulty and confusion is a failure to discriminate between a true though gratuitous permission and a mere toleration of or a failure to prevent or punish actually undesired or even highly distasteful trespassers. In the majority of cases in which an owner's duty to a "licensee" has been judicially discussed, the so called "licensee" has been a mere tolerated trespasser. And it may well be that a court may properly hesitate to accord the same status to him as to one whom the owner has actually chosen to admit to his premises. An actual permission is generally given to some person or class for some particular purpose, and so is definite and limited both as to area and duration. The owner who has given it may well be taken to have voluntarily surrendered so much of his liberty of use of this area during this time as is necessary to avoid injuring his guests if they avail themselves of it. But it is quite a different matter to impose a similar restriction upon owners who do not exclude or punish undesired intruders. Both the area of intrusion and the times when it may occur are generally indefinite. The restriction on his freedom of use would therefore be far more substantial, and it would be a restriction not created by any act expressing his will to suffer it, but imposed upon him by the wrongful acts of the intruders and his mere failure to take active steps to prevent them.

²⁷ This seems to be in part at least the basis of those Massachusetts decisions which deny the duty of railroads to take care in the operation of these trains or to give warning of their approach when passing over or coming to permissive crossings; see *Cheney v. Fitchburg R. R.* and *June v. B. & A. R. R.*, note 10 *supra*.

In some few cases the owner's inaction may actually indicate a will to permit the entry, such is not usually the case.²⁸ The question, like that as to whether physical changes in the property are such as warrant others in assuming that they are made in preparation for his visits, and as justifying him in assuming them to be an invitation, is one of the probative value of the owners conduct, whether passive or active. And if there is any obvious explanation other than that of an apparent will to permit or invite, the inaction or preparation loses even its quality of prima facie proof of such will.³⁰ Failure to prosecute persons who intrude despite signs notifying them not to trespass, where such persons are customers of the owner, whose trade would be lost if he took legal proceedings against them,³¹ failure to go to the expense of putting up intruder-proof fences or of stationing a corps of guards to patrol every available point of entry, or to take any other steps to exclude trespassers, which are obviously futile unless so done as to be ruinously expensive, are neither prima facie proof of consent nor would they justify the public in assuming a true acquiescence in its intrusions. Those decisions and dicta which go even further and regard them as equivalent to a true license or permission eliminate the consent of the owner as a factor determinative on his liabilities and duties.

As a general rule, mere failure to prevent the perpetration of a wrong, or to object to it or to punish the wrongdoer, can not give the wrongdoer the right to repeat the offense, much less can it give the color of right to his subsequent misconduct. It may be that if an owner fails to object

²⁸As in *Pomponio v. N. Y., N. H. & H. R. R.*, *supra*, note 21.

²⁹As in *Murphy v. Boston & Albany R. R.*, 133 Mass. 121 (1882), *Central R. R. v. Robertson*, 95 Ga. 430 (1894), and *Slaughter v. R. R.*, 167 Ind. 330 (1906); and see *Holmes, J. in Chenery v. Fitchburg R. R.*, 160 Mass. 211 (1893). See also *Holmes v. Drew*, 151 Mass. 578 (1890); *Knowlton J. in Plummer v. Dill*, 156 Mass. 424 (1892) p. 430; and *Stevens v. Nichols*, 155 Mass. 472 (1892), as to the duty of a landowner who has given to a portion of his property the appearance of being part of the highway to assume the duty of maintaining it in good repair.

³⁰*Furey v. R. R.*, 67 N. J. L. 270 (1901); *Johnson v. R. R.*, 125 Mass. 75 (1878).

³¹As in *Lowery v. Walker, L. R.* (1911) A. C. 11.

to an habitual course of trespassing, he would be taken to have forfeited his right to exact the penalty to which he would otherwise be entitled. Such toleration might be a defense to an action by the owner or to a criminal prosecution for trespass, on much the same principal that a failure to require the observance of the letter of a continuing contract may preclude the party so failing from treating a later and similar departure from strict performance as a breach. In each case, his toleration of the violation of his strict rights may lull the other into a feeling of security, and one thus sleeping on his legal rights may be estopped from asserting them till he has given notice that his temper has changed and that he will thereafter require them to be strictly observed. But while he may thus forfeit his right to treat the other's act as a wrong against him and from exacting the prescribed penalty, this falls far short of creating in the wrongdoer a right against himself.

It is noteworthy that no court has held that inaction in the face of a probability of occasional trespasses at any one of a number of points on an owner's premises or a failure to meet and eject a person who is known to intend to intrude confers on the intruder a "license by acquiescence." The so called licence implied from acquiescence arises only where there are habitual and frequent intrusions by a numerous class upon a more or less strictly defined area. So while many jurisdictions require railroads to anticipate the presence of travellers upon mere permissive crossings³² or upon tracks laid through a town on a highway,³³ or upon a beaten path along the tracks and within their right of way³⁴ and to exercise toward them a degree of care indistinguishable from that owed to persons passing over a level highway crossing, no similar duty is recognized as due persons trespassing upon their right of way in general.³⁵ And yet the prevalence of such trespasses is notorious.

³² See cases cited in note 21, *supra*.

³³ *Baltimore & Potomac R. R., v. Cumberland*, 176 U. S. 232 (1900), and see *Smedis v. R. R.*, 88 N. Y. 13 (1882); *Lake Shire etc. R. R., v. Bodemer*, 139 Ill. 596 (1892); and *Lafayette etc. R. R., v. Adams* 26 Ind. 76 (1866).

³⁴ *Brown v. R. R.*, 73 N. H. 568 (1906); *Davis v. R. R.*, 58 Wis. 646 (1883).

³⁵ *Shea v. R. R.*, 69 N. H. 361 (1898) p. 363; *Kaseman v. Sunbury* 197 Pa. 162 (1900); *semble Wabash R. R., v. Jones* 163 Ill. 167 (1896).

Many, if not the majority of jurisdictions hold that: if there has been intrusion sufficiently habitual to make its repetition not merely possible but probable,³⁶ upon a definite area, by a class sufficiently numerous to make the danger substantial, the public interest in the preservation of its most valuable asset, the life and limbs of its members, requires the owner to forego his privilege to consider only the safety of those to whom he throws open his land, and demands that he shall refrain from doing, without notice, acts outside of his ordinary and normal use of his land, which create new and concealed dangers thereon. This duty may be similar or identical in extent to that owed to persons actually permitted to come on the premises for their own purposes. But it does not arise from the owner's consent, but from the probability of injury so likely and so serious that public policy requires that it be prevented even at the cost of trenching upon the traditional privileges of landowners.³⁷

This may seem hypercriticism, but the popular American formula that the owner only owes duties to business invitees or to licensees and none to persons coming of their own right on his premises, much less to those who come by their own wrong can only be justified on the idea that the owner owes no duty to anyone till he has them opened his land to them. It is, therefore, important to recognize that here is a class to whom protection is given, who come on land without the owner's will, and this is so, even though in order to secure apparent conformity between practice and tradition, the courts choose to call that a license which lacks every element of true consent, or to hold that a "license" is to be "im-

³⁶ Probable on the particular occasion, certain to occur with reasonable frequency from time to time.

³⁷ In *Lowery v. Walker*, L. R. (1911) A. C. 11, Lord Loughborough L. C. said, p. 12, "The plaintiff was not proved to be in this field of right; . . . he was there as one of the public who habitually used the field to the knowledge of the defendant, . . . the defendant did not take steps to prevent this user; and in those circumstances it can not be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in the field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal."

plied" from facts which do not even amount to prima facie proof of an actual willingness to receive the so called "licensee." There is no English case squarely presenting the question of an owner's duty to refrain from acts likely to injure persons whom he knows to have come or whom he has reason to expect to come on his land by some right or privilege of their own, which in no way depends on the owner's consent or license expressed by invitation or actual permission or "implied" from acquiescence.

But as will be later seen, the primary distinction drawn is between the owner's duty to those "lawfully" or of right upon his premises and those wrongfully there. Invitation and permission are important as showing the most usual basis of a lawful entry, the owner's actual leave or license; "acquiescence" as precluding the owner from treating the tolerated intruder as a mere trespasser³⁸—but the essential thing is the lawful or unlawful character of the intruder's presence. As in the majority of American jurisdictions, the fireman or policeman is treated as if a "bare licensee" it would at least follow that he should be given at least as much protection as that barest of "bare licensees," the so called "licensee by acquiescence."³⁹

³⁸ See opinion of Lord Halsbury in *Lowery v. Walker*, L.R. (1911), A. C. 11; pp. 13 and 14. Lord Atkinson speaks p. 4, of the plaintiff as being "lawfully in the place where the accident happened to him."

³⁹ See accord: *Houston Belt etc., R. R. v. O'Leary*, 136 S. W. 601, (Tex. Civ. App. 1911), though it would seem difficult to sustain the court's view that each explosion of fireworks was a new negligent act occurring while the plaintiff, a fire marshal, was on the premises, though the explosions were not caused by any deliberate or negligent act of the defendant done after his entry, but were due to the same preceding negligence which caused the fire which the fire marshal was called to put out and indeed were themselves part of the same fire.

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(To be Continued)