

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

III.

As has been seen, the general principle of tort law which imposes upon any one who does an act which he should realize will create an undue risk of injury to a determinate class of persons, the liability to answer for any harm resulting therefrom to a member of that class, has to a large extent prevailed over a landowner's originally complete immunity in respect to any acts done by him on his own premises, unless such acts were criminal or quasi criminal in character.

It remains to consider the liability of the owner to persons injured by the bad physical condition of his property. A defective physical condition of a premises may be one whose harmful effects extend beyond the boundaries of the premises itself, or it may be one whose effects are so restricted that it threatens harm only to persons coming upon the premises. It may cause an injury to persons or property within or without the premises.

Persons injured within a premises by a dangerous condition thereon may come upon it either with or without the consent of the owner. Those coming upon premises with the owner's consent may come by his invitation or by his permission; the purpose of their visit may be connected with the owner's business or social use of his premises or may have no relation thereto, being to serve some purely personal purpose of the visitor. Those coming without the owner's consent may come as trespassers, having no right or privilege to enter, or they may come in the exercise of some right or privilege given them in derogation of the owner's right of exclusive possession. Such right or privilege may arise out of some antecedent misconduct of the owner, or because the purpose of the entry is of such social importance as to require the owner's right to yield to public necessity, or by some custom or long-continued adverse user which creates in them a right of way.

Mere ownership of land creates no duty to put it in such physical condition as to be harmless to others. No one can complain of an injury to his person or property which is due to the unchanged natural condition of another's land.¹

But any act done by the owner with or upon his land gives rise to duties and liabilities varying with the nature of the act.² If an owner erects buildings or makes improvements artificially changing the natural condition of his land, he is not only bound to see that the improvements as planned shall do no harm to others in the exercise of their legal rights, but he and his successors are bound to maintain them in such condition as to render such harm improbable. It is therefore universal law that an owner is bound to keep the structures upon his premises in such repair that they may not fall upon his neighbor's land or upon an adjacent highway to the injury of the public lawfully travelling thereon.

But an owner, who has improved his land by erecting buildings upon it or by artificially changing its natural condition, as for example by building a roadway over it, does not by that act necessarily assume any obligations either as to its plan or maintenance toward those whom he admits to his premises. Since he can exclude them, since they have no right to admittance save through his consent, he can attach such conditions as he sees fit to their admittance. The relation between them is voluntary and not of right. So, as in all voluntary relations, even the most favored class of visitors can ask no more than full knowledge of the condition of the premises which they are allowed to enter.³ The owner's duty rises no higher than that of making the appearance conform to the reality, of making the condition as good as it looks, or of bringing to the knowledge of the visitor that it is as bad as it is. The visitor, having no right to enter the premises, is not entitled to find it safe for his

¹ *Woodruff v. Fisher*, 17 Barb. 224 (N. Y. 1853); *Roberts v. Harrison*, 101 Ga. 773 (1897); and see *Giles v. Walker*, L. R. 24 Q. B. D. 656 (1890).

² See *Bud v. Elwes*, 18 L. T. N. S. 727 (Eng. 1868) and *Crowhurst v. Burial Board*, L. R. 4 Ex. Div. 5 (1878).

³ See *Voluntary Assumption of Risk*, 20 Harv. Law Rev. 14, 91 (1906).

visit; he is only entitled to know its real condition so that he may intelligently make up his mind to accept or reject the owner's permission to enter it.

The trend of decisions is to divide those whose right to enter an owner's premises is derived solely from the owner's consent into two classes: the first, commonly called "invitees" or "business invitees," being those in whose visit the owner has some interest, business or otherwise; the second, commonly called "licensees" or "bare licensees," being those to whom he accords his consent out of mere grace, their visit being for their own purely personal purposes.⁴

The position of the "business guest" is somewhat better than that of the "bare licensee." While the owner is bound to disclose to both any defect of which he knows and which he should recognize as creating a risk of injury to either, he may assume that the bare licensee, knowing that the owner has no interest in his visit, and therefore cannot be expected to have made special preparations for his coming, will be on the alert to discover for himself the true condition of the premises; while a business guest, being entitled to expect to find the premises put in order for his visit, is not to be expected to discover defects unusual in a properly prepared business premises. And the owner, having an interest in the "business invitee's" visit, must by inspection ascertain the actual condition of the premises, so that ignorance due to a failure in inspection will not excuse his failure to give warning, while he owes no such duty to a bare licensee, it being immaterial that it would cost the owner a very slight effort to make an effective inspection and that it would be impossible for the licensee to make such an inspection in the course of his very temporary use of the premises.⁵

It is a curious fact that until the question of the right of policemen, firemen and other governmental officials to

⁴ See "The Basis of Affirmative Obligation in the Law of Torts" 53 U. of P. Law. Rev. 209, at pages 223-229.

⁵ See "The Basis of Affirmative Obligation in the Law of Torts" 53 U. of P. Law Rev. 209; at pages 223-229.

recover for injuries caused by the defective condition of private premises which their official duties required them to enter came before the American courts,⁶ no case had required any court to pass on the question of the duty of a landowner toward those who entered his property in the exercise of some right or privilege thereover, which was itself in derogation of the otherwise complete right of an owner to exclude from his land any one he saw fit.⁷

⁶ The first case in which the right of a public officer to recover for injury caused by the dangerous condition of premises which he had entered in the performance of his duty was *Low v. G. T. R.* 72 Me. 313 (1881), where the Court held that a United States Customs officer was a business invitee, while he was prowling about a dock in search of smugglers. The next case was *Leary v. Executor v. Godfrey*, 138 Mass. 315 (1885), in which it was held, that the appearance of a part of the premises, even though not a "wrought avenue," indicating that it was the intended mode of approach to the buildings thereon, could, like a wrought avenue, have "held out exactly as great an invitation to the public having lawful occasion to visit the tenement when some one else lived there, as though the defendant" (the landlord who had let the tenement as apartments reserving control of the approaches thereto) "had done so" himself. In *Woods v. Lloyd*, 16 Atl. 43 (1888), where a widow of a policeman proved that her husband had been killed while pursuing a disorderly person, by falling over the unprotected edge of the lot to the street below, the "precipice" being caused by the city's grading of the street, the Supreme Court of Pennsylvania delivered the following per curiam opinion: "As the plaintiff did not exhibit a single element necessary for the sustentation of her action, the court did well to order a non-suit." In *Gibson v. Leonard*, 143 Ill. 182 (1892), the Supreme Court of Illinois held that a member of an insurance patrol having as such a statutory right of entry into any burning building was a licensee, citing *Cooley on Torts* 313, and followed *Sweeney R. R.*, 10 Allen 368 (Mass.) in holding that "a licensee who enters by permission only . . . cannot recover for injuries caused by obstructions or pitfalls. He goes there at his own risk and enjoys the license subject to its concomitant perils." The later cases adopt this reasoning with some occasional elaboration; *Woodruff v. Bowen*, 136 Ind. 431 (1893); *Becher v. Daniels*, 18 R. I. 563 (1894), 19 R. I. 49; *Hamilton v. Minn. Deck Co.*, 78 Minn. 3 (1899); *Lunt v. Post Printing Co.* 48 Colo. 316 (1910); *Omaha etc. Co. v. Anderson*, 78 Minn. 3, (1905); *Greenville v. Pitts*, 102 Tex. 1 (1902); *Casey v. Adams*, 234 Ill. 350 (1908); *Fryar v. Borrowings Adling Machine Co.* 132 Tenn. 612 (1915); *Woods v. Miller*, 30 App. Div. 232 (N. Y. 1898); *Eckes v. Stetler*, 98 App. Div. 76 (N. Y. 1904); *Racine v. Morris*, 136 App. Div. 466 (N. Y. 1910). In none of them, except *Fryar v. Borrowings Co.*, was the injury sustained while on a part of the premises so prepared as to indicate the owner's intention that it should be used as an approach to a passage way over the premises, and while using it for that purpose, (see ante 69 U. of Pa. Law Rev. 144, January, 1921) and in *Fryar's Case* the injury was due to a defective condition, which, while discoverable by inspection, was not shown to have been known to the defendant.

⁷ Except in *Kohn v. Lovett*, 44 Ga. 251 (1871), which presented the cognate question of the right of a private person, a neighbor, coming on the premises to aid in putting out a fire thereon, to recover from the owner for injuries sustained by falling into a well, which the Court said was not near to any public highway or "to any passway"—and see the interesting case of *Vale v. Bliss*, 50 Barb. 358 (N. Y. 1869), where the plaintiff, who was forced by an obstruction placed by the defendant upon his sidewalk to deviate upon his premises, was held entitled to recover for injuries which he sustained by falling into an excavation dug within the defendant's property line.

Whether that line of cases, which hold that an owner is not bound to exercise any care to fit his premises for the possible entrance of firemen, policemen and other public officials having as such the right of entry, are or are not correct expositions of law—it seems quite clear that the theory on which the existence of the duty is denied is untenable. If the public officer is not an "invitee" because his right to enter does not depend on an invitation extended to him and because he enters, even if summoned by the owner, in performance of his duty as public officer and not in acceptance of the invitation, it is equally clear that he is not a "licensee" of the owner, since his entry is no more referable to a permission than to an invitation. Such an officer may be entitled to the same, or to a less or greater protection than a "licensee" has the right to demand, but the measure of care owing to him cannot be satisfactorily determined by calling him a "licensee," after elaborately and conclusively demonstrating that his right does not depend upon the owner's consent,⁸ upon which the status of "licensee" depends as fully as that of "business invitee."

On the other hand, the opinion of the New York Court of Appeals in *Meiers v. Koch Brewery*,⁹ while avoiding this error, gives no reason for the existence of the broad general duty which it imposes on landowners to use reasonable care.

⁸ This reasoning is most fully stated in *Lunt v. Post Printing Co.* 48 Colo. 316 (1910), but it appears in some form in practically all the cases denying recovery to firemen and policemen. It is important to note that in that part of *Cooley on Torts* p. 313, cited to show that firemen are licensees—the distinguished author is dealing with a landowner's right of complete and exclusive dominion. He divides those licenses which justify another's entry into three classes, implied, express and by the law. He makes no distinction between invitation and permission, nor does he attach any importance to the purpose of the licensee's visit. His statements neither have nor are intended to have any relation to the right of the three classes of licensees to expect or require the landowner to take care for their protection. Thus a definition of licensee, which is intended only to classify a particular form of justification for an entry, is added to a quite different classification of invitees and licensees, stated in *Sweeney v. R. R.* as determining the duty of the landowner toward them. In a word the American cases, denying recovery to persons having an independent right of entry on another's land, are based on a definition of licensees never intended to apply to the determination of the owner's duty toward them and a distinction drawn between invitation and license, which is contrary to the English Cases and which has been abandoned in the very jurisdiction in which it originated.

⁹ Since the publication of the first parts of this article this case has been reported in 229 N. Y. 10.

to keep a road upon his premises prepared as a means of access to the buildings thereon "in a reasonably safe condition for those using it" (in a right independent of the owner's consent) "as it was intended to be used." Thus it is in sharp conflict with the decision and *dicta* in many American jurisdictions. It gives no reason for the duty which it recognizes; they give an obviously erroneous reason for denying the existence of such a duty.

In some respects the position of a person injured upon another's premises, while in the exercise of a right of entry whose existence does not depend on the owner's consent, is analogous to that of an owner of land or traveller upon a highway injured by the fall of a defectively constructed or maintained building on an adjoining or abutting premises. In both cases the injury is due to the bad state of artificial conditions created by the owner or his predecessors; in both the person injured is at the place when the injury occurs in the exercise of a legal right of his own, which in no way depends on the owner's consent for its existence.

In other respects his position is like that of a business invitee or licensee. In both cases, the injury is sustained on the premises and in consequence of the injured person's use of the defective thing.

If the liability of a landowner toward those owning property or enjoying the public right of travelling a highway abutting upon his property is based upon any general principle of law and is not a survival of the concept that the King's law, like international law today, was peculiarly concerned with the contracts between landowners, regarded as in many respects sovereign within their own boundaries, it is upon that vaguest of all legal maxims, "*Sic utere tuo ut alienum non laedas*"—"in the use of one's own rights one must not injure others in the exercise of their rights." This should apply as fully to those injured in the exercise of rights which bring them into the premises of another and so into contact with a danger created by that other on his premises in the course of his use thereof, as it does to one

injured on his own property by the fall of a cornice from his neighbor's house or to a man similarly injured upon a highway.

The fact that the injury was caused by the plaintiff's use of the defective road should not be of decisive importance. Where the right or privilege to use another's property, whether by permission of the owner or in some independent right of the user, carries with it the possession of the property—or the right of access to it, not only for its use but also for its preparation for safe use, it seems settled law that the duty of preparing and maintaining it in safe condition rests on the user. So a customary right of way is reparable by those entitled to enjoy it,¹⁰ and they are entitled not only to use the way but to enter the servient tenement in so far as this is necessary to enable them to repair the way.¹¹ Such cases differ radically from those in which the right is one of occasional and temporary use for a particular purpose. Such right carries with it no right to enter except when the conditions arise which require or justify the entry. There is no ancillary right of antecedent entry to prepare or repair the *locus* of the privilege. While it may be proper to impose on those having the power to perform it the duty of taking such steps as may be necessary to secure their safety in the use of another's property, it is quite a different thing to impose such duty in the teeth of a known and obvious inability to perform it.

And it would seem that the mere fact that the injury is sustained within the premises rather than outside it should also be immaterial.¹² So long as the King's law stopped,

¹⁰ The Laws of England (Halsbury) Vol. II. p. 294 § 575 and cases cited in note (q).

¹¹ The Laws of England (Halsbury) Vol. II. p. 294-5 § 575 and cases cited in note (r).

¹² This fact has, perhaps naturally, been given an undue importance. When the injury is sustained outside of the premises there is no need for the sufferer to prove that, as against the landowner, he had any right to be at the place of injury. But when he is hurt on another's premises, to clear himself of being a trespasser, who as such can obviously have no right to expect or demand protection, he must prove his right to come on the premises. Since the right to enter without or against the owner's consent is rare and exceptional, in the vast majority of cases he can only do this by showing that the owner had,

as it did in its early stages of development, while the power of the crown was feeble, short at the boundaries of the domains of private landowners, dealing as international law now deals with the contacts between what were in effect separate sovereignties, the fact that the injury was received without rather than within the premises might well be controlling. But the power of the State has now no such limitation. And it is therefore an anachronism to carry over into modern law a distinction based on conditions which have long since disappeared.

As has been seen, the landowner's original immunity from responsibility for acts done on his premises, itself based on this concept that the landowner was sovereign within his own boundaries, has been seriously curtailed by modern decisions,¹³ and there is no greater reason to regard as controlling the archaic idea of his right as sovereign to determine for himself in what physical condition he shall maintain his premises.

Indeed this concept has yielded to social necessity in one very important class of cases. There can be no greater inroad in an owner's right to maintain his premises in such condition as he sees fit than to make him answerable for injuries caused by its condition to trespassers, who without right of their own or the consent of the owner intrude themselves upon his premises. Yet a large majority of common law jurisdictions hold landowners liable to infant trespassers injured while playing on, about or with artificial structures or conditions erected or created by the

by some invitation or permission expressly or impliedly given him, consented to his entry. In such cases (and practically no others had come up for decision till the right of public officers was raised in the line of cases now under discussion) the plaintiff could only justify his entry by showing the owner's consent and his entry being by the owner's consent, his rights and the owner's duties were fixed by the expressed or implied terms and conditions of the invitation or permission. Thus there grew up an assumption that a landowner owed no duty of care in regard to the physical condition of his premises to any person other than those whom he chose to admit thereon. But in the exceptional case where the injured man can show that he has a right of his own to enter and so does not have to rely on the owner's consent as fixing the existence and extent of their respective rights and duties, the fact that the injury is received on rather than off the premises should be immaterial.

¹³ Ante 69 U. of Pa. Law Rev. pp. 237 to 252 (March, 1921).

owner upon his own premises, whether for his pleasure or for his business purpose.¹⁴ This has been criticized as an exhibition of excessive humanitarianism,¹⁵ but it seems rather to be a natural response to a public sentiment which is justified by the grave risk to a numerous and socially important class of citizens and the comparatively slight burden placed upon the landowner.¹⁶ It would be impossible to minutely examine the present state of law on this subject in all the common law jurisdictions. The decisions show an effort to hammer out of a compromise between the interest of society in preserving the safety of its children and the legitimate interest of landowners to use their land for their own purposes with reasonable freedom, and so are naturally in a state of flux and motion. They show an effort to arrive at a workable compromise, rather than an enunciation of definite and settled rules capable of automatic applica-

¹⁴ See the cases cited in the notes to *Ryan v. Towar*, *Bohlen's Cases on Torts* 403, and in the notes to *Keup v. Milwaukee & St. Paul R. R.*, *Ames & Smith's Cases on Torts* (Pound's Edition) 168.

¹⁵ See the able and interesting article by Hon. Jeremiah Smith on "Liability of Landowners to Children entering without permission" 11 *Harv. Law Rev.* 349, 434.

¹⁶ Compare the prevalent modern tendency to require landowners in their use of their property to consider the safety of tolerated intruders (ante 69 *U. of Pa. Law Rev.* pp. 248 to 252, especially p. 251). And just as courts attempt to conform this new practice to the old formula that toward trespassers and even licensees the owner owes no duty except to refrain from inflicting intentional, wilful or wanton injury upon them, by calling such tolerated intruders "licensees by acquiescence," and by dubbing, as "wanton" or "wilful," acts which lack any of these qualities necessary to constitute wantonness or wilfulness, so they seek to bring the innovation in favor of the trespassing children into apparent conformity with abandoned concepts by calling the attractive but dangerous condition a "trap" or "allurement" or treating it as an invitation to enter. Yet even if it is a "trap," in the sense in which that term is used to denote a danger known to the owner and unknown to a visitor, there still remains the necessity of proving the infant's right to come within its reach. And mere knowledge that a possible adult trespasser is ignorant of a pitfall on the land is not enough to make the owner answerable if he trespass and fall into it. The word "allurement" implies in every other connection a thing done with the purpose of alluring, and the word "invitation" also implies an act done or condition created which is at least capable of being construed into an expression of desire to receive the person invited. Every one of these phrases is merely a perversion of language—in each the real underlying idea is that the defendants know that children will be unable to resist the temptation to intrude and will in their intrusion encounter conditions, which of themselves might warn adults of the danger lurking therein, but convey no such warning to their childish inexperience.

tion to the particular facts of each case as it occurs.¹⁷ But they show certain rather definite tendencies, on the one hand, to look at things as they are rather than in a spirit of Blackstonian optimism which shuts its eyes to the immense prevalence of minor lawlessness, particularly on the part of those who are too young to be bound by the rules of society, and to the impossibility of expecting the poor to exercise any effective supervision over their young, and thus to reject the suggestion which may appear theoretically sound but which is in practice unworkable, that it is the primary duty of parents to care for their children and that, if they prove unable to perform this duty, it is the State's duty to provide safe playgrounds and parks where children may play without danger; but on the other hand, to recognize the owner's right to use his land, for his business purposes or even for his pleasure or whim, more or less as he pleases within reasonable limits.

It is, therefore, generally required either that the condition with which the child tampers is one which is itself unnecessary for the reasonable enjoyment of the property, or that if the structure is itself useful that it could be made safe even for children without either interfering with its practical use or without an expense which would impose a real burden and reaction upon the owner's use,¹⁸ or else

¹⁷ In many jurisdictions which enthusiastically adopted the broad principle underlying the first "turntable cases," *Stout v. R. R.*, 17 Wall. 637 (1873), have shown a marked tendency to restrict its application, sometimes at points more or less arbitrarily drawn, as for instance, the restriction of liability to things, which are "attractive to children by their love of motion 'by means other than their own locomotion';" *Pekin v. McMahan*, 154 Ill. 141 (1895); and see *Cent. Branch U. P. R. R. v. Herrigh*, 23 Kan. 347 (1880); and the cases cited in note 4 to *Ryan v. Towar*, *Bohlen's Cases on Torts*, 403, p. 408; and compare *Laltham v. Johnson*, L. R. (1913) 1 K. B. 398 and *Hardy v. Central London Ry.* 32 T. L. R. 843 (C. A. Eng. 1920) with *Cooke v. Gt. Western Ry.*, L. R. (1909) A. C. 229.

On the other hand jurisdictions which refused to follow *Stout v. R. R.* in cases presenting substantially identical facts have shown a distinct tendency to give a very liberal protection to infant trespassers injured while meddling with other kinds of dangers; compare *Carr v. So. Traction Co.*, 253 Pa. 274 (1916) with *Thompson v. R. R.*, 218 Pa. 444 (1907); and see, for a valuable discussion of the Pennsylvania Law on this subject, the opinion of Keller, J. in *Balsler v. Young*, 72 Pa. Super. Ct. 502 (1919).

¹⁸ See *C. B. & O. R. R. v. Kraysenbuhl*, 65 Neb. 889 (1902) and *United Zinc Co. v. Britt*, 264 Fed. 758 (1920), in which the court emphasized the fact that the pool, containing poisonous chemicals into which the plaintiff fell, was

that if the condition is useful and the structure cannot be made safe without undue interference with the owner's use of it and without undue expense, that access to it could readily be prevented.¹⁹ And again, there is a tendency to restrict the owner's liability to conditions, which though they might warn adults of their danger, convey no such intimation to inexperienced children and to deny recovery where it is obvious that the injured child appreciated the danger and meddled with it in a spirit of bravado and to show off his recklessness to his comrades.²⁰

It is, therefore, submitted that the duty which the opinion of the New York Court of Appeals in *Meiers v. Koch*, imposes on landowners is justified by the principles which underlie the whole subject of the varying duties of landowners to the various persons affected by the good or bad condition of the artificial improvements made upon their premises, and that it is also sound in limiting the duty of the owner toward those who have a right in themselves to enter his premises, to the use of reasonable care in regard to only so much of his premises as he has prepared a way or approach, which as such and from the preparation put upon it indicates that it is intended to be so used by all who have the right to enter the premises.

It would be an obviously unreasonable burden to impose on landowners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of

no longer of any economic use, the plant having been abandoned and dismantled. In the original turntable case, *Stout v. R. R.*, 17 Wall. 657, Hunt, J. said p. 662. "It was not shown that this 'locking the turntable' would cause any particular expense or inconveniences to the defendant."

¹⁹ See *Hardy v. Central London Ry.*, 32 T. L. R. 843 (C. A. Eng. 1920).

²⁰ *Rodgers v. Lees*, 140 Pa. 475 (1891); *Edgington v. R. R.*, 116 Iowa 400 (1902) per Weaver, J. p. 436—; *Brickley Car Co. v. Cooper*, 70 Ark. 331 (1901); *George v. Los Angeles Ry.*, 126 Cal. 357 (1899).

²¹ Compare the tendency (ante 69 U. of Pa. Law Rev. p. 250) to restrict the duty of owners toward tolerated intruders to particular and limited areas over which their intrusions have become habitual; and see *Woods v. Miller*, 30 App. Div. 232 (N. Y. 1898), where the Court emphasizes the injustice of requiring an owner to fence his roof for the sole purpose of preventing firemen from falling, if their duty should happen to require them to use the roof as a platform from which to fight a fire on an adjoining property; and see also *Woods v. Lloyd*, 16 Atl. 43 (Pa. 1888) and *Greenville v. Pitts*, 102 Tex. 1 (1902).

entry may never accrue." The broad range of such a duty, the impossibility of forecasting the precise point to which the officer's duties may call him, the infrequency of his probable visits, all clearly preclude the idea that the balance of social benefit can require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer, to prevent so vague a risk of so improbable an injury.

Thus limited the decision imposes far less onerous burdens on landowners for the protection of persons legally entitled to enter than are imposed by even those courts who go least far in protecting infant trespassers. Landowners are required to take precautions whose sole purpose is the protection of children, precautions which they owe to no other class of persons likely to come on their premises, by consent or otherwise. The duty applies at large to every part of their property known to be open to the incursions of children and appropriated by them for their own use as a playground. The duty to persons lawfully coming on the premises is restricted to a small and definite area, appropriated and prepared by the owner himself as the way to be used by persons lawfully coming thereon. This area is fixed by the will of the owner not by the desires or needs of those entitled to enter his premises. And this duty imposes no new restriction on the owner's use of his land—it imposes no burden of new expense. It is universally held that he is under a duty to his "business invitees" to take as much or more care. The opinion in *Meiers v. Koch Brewery*, therefore, requires him to do nothing which he is not universally regarded as bound to do—to incur no expense which the proper performance of his universally recognized duty to "business invitees" would not require. At most it imposes a new liability for the neglect of what he is admittedly bound to do—a new penalty for the breach of an old duty. It does not make the proper use of his land more expensive; at most it makes it more costly to misuse it.

For other reasons it seems proper to require the owner to use even greater care for the protection of a public officer

entitled to enter his land to perform his public duties than he is required to exercise for the protection of infant trespassers. If an owner must expect a young child to yield to the temptation, which an attractive but dangerous condition on his land puts upon the child, the temptation operating upon the child's natural instincts as the "piece of stinking meat" did upon the dog in *Townsend v. Wathen*,²² he should be as much if not more bound to expect a fireman or policeman to enter in the performance of his duty. The duty of such an officer is as strong a compulsion and the compulsion should not be regarded as a less important factor, because his response to it is obligatory, lawful and necessary to the protection of society, instead of an unlawful, if excusable, yielding to a temptation too strong for the non-existent or undeveloped social sense of the dog or child.

It is quite clear that when the purpose of the plaintiff's visit is such as would make him a "business invitee" had he been employed by a personal employer, he does not forfeit this status because he is employed by a municipality which has chosen to carry on activities, such as furnishing gas or water²³ or collecting garbage²⁴ which might well have been left to private enterprise.²⁵

²² 9 East 277 (1808).

²³ As in *Toomey v. Sanborn*, 148 Mass. 28 (1888). So where the city entered into a contract for construction work which required the presence of a city engineer to inspect the work as it progresses, such engineer is as much a "business invitee" while at the scene of the work as though the work was being done under a similar contract for a private individual, *Pickwick v. McAuliffe*, 193 Mass. 70 (1906).

²⁴ As in *Finnegan v. Fall River Gas Works*, 159 Mass. 311 (1893) and *Kennedy v. Heisen*, 182 Ill. App. 200 (1913).

²⁵ The suggestion which occurs first in *Lunt v. Post Printing Co.*, 48 Colo. 316, p. 338, that a public officer, unlike the servants of a private master should look solely to the governmental agency, whose public duties he is performing, for relief is entirely opposed to the trend of modern legislation regulating the right and obligations of employees and employers *inter se*. Practically all of the many Workmen's Compensation Acts which have been enacted throughout the United States within the last ten years, while requiring employers to pay compensation irrespective of their own, the employee's, or a third person's negligence, preserve the liability of a third party whose misconduct has caused the employee's injury or death. They give to the injured employee the right to recover from such third person, either in addition or as an alternative to their right to demand compensation from their employers. And the employer who has paid or is liable to pay compensation is given the benefit of the employee's right of action in some acts, for example that of New York, by transferring the employee's right of action to the employer, if the employee claim compensation

But under the facts of that case the decisions not only of the English Courts but of a large number of American jurisdictions²⁶ would have supported the result on narrower grounds. The defendant had dug a coal hole halfway across the driveway which it had left open. On the night of the accident the electric lights which the defendant had placed along the drive to light it were not lighted. Had they been lit, they would have disclosed the pitfall and enabled the plaintiff to avoid it. The drive was not closed to traffic at night, indeed the fact that the defendant had thought fit to place lights upon it would seem to indicate that it was intended to be used at night as well as by day, and there was direct evidence that it was so used by at least one person who filled all the requirements of a "business invitee." Thus no question was raised as to whether the defendant should go to the expense of lighting the road

from him, in others, as in the Pennsylvania Act of 1915, by subrogating the employer to the employee's rights against the delinquent third person, to the extent of the compensation paid or payable by the employer. It is unthinkable that had the plaintiff in the Lunt case, been injured on the highway while on his way to the fire by a car recklessly driven, Justice Musser would have held that he must look to the generosity of the city for redress.

In the same opinion pp. 337, 338 the additional argument is advanced against permitting the widow of a fireman to recover for his death from suffocation by chemical fumes erroneously thought by the defendant's employee to be smoke from a fire, that if the owner owed any duties to firemen, that "This would call for reciprocal duties from the firemen and thus their work would be hampered and their minds diverted by the consideration of their private duties." It is submitted that the court in holding that a fireman owed no duty to the owner, upon whose property he is performing his functions, confuses him with the governmental agency which he is serving and which as such and while exercising its police power is undoubtedly immune from legally enforceable liability. But it has never been suggested that a police officer is entitled to a personal immunity for wrongful acts even though done in good faith in the performance of his duty. And while the "stress and excitement" of a fire and the necessity of prompt decision would naturally create an emergency which would excuse mere errors of judgment, it is submitted that a fireman while performing his duties is not a chartered libertine free to injure private property at his own whim and caprice, and should not be made an outlaw and a wolf's head to whom no man owes any duty of care.

The very fact that the Colorado Court thought it necessary to bolster up its principal theory by arguments so manifestly unsound of itself lessens the weight of its opinion.

²⁶See *Raltestone v. Cassirer*, 3 Ga. App. 161 (1907); *Hill v. President & Trustees*, 61 Ore. 190 (1912); *Brinkson v. Chicago R. R. Co.*, 144 Wis. 614 (1911); *Campbell v. Boyd*, 88 N. C. 129 (1883); in *Union Pac. R. R. v. McDonald*, 152 U. S. 262 (1893) and *Penso v. McCormick*, 125 Ind. 116 (1890) the injured licensee was a child, but the language of the Court was equally applicable to adults.

in anticipation of the highly unlikely possibility that a fire on his own or some adjacent property would require firemen to drive over the way. The condition of the driveway thus fell directly within the definition of a "trap" given by Hamilton, L. J. in *Latham v. Johnson*.²⁷ "A trap," he said, "is a figure of speech not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger." The English cases both by decision and *dicta*²⁸ uniformly support the Lord Justice's further statement that "owners and occupiers alike expose licensees and visitors to traps on their premises at their peril."²⁹ And the trap need not be laid for the

²⁷ L. R. (1913) 1 K. B. 398, p. 415.

²⁸ *Bramwell B. in Southcote v. Stanley*, 1 H. & N. 247 (1856); *Wilde B. in Bolch v. Smith*, 7 H. & N. 736 (1862); *Willes J. in Gantret v. Egerton*, L. R. 2 C. P. 371 (1867); *Willes J. in Corby v. Hill*, 4 C. B. N. S. 556 (1858). So one who lends a chattel to another is bound to warn him of a concealed defect thereon known to the lender, *McCarthy v. Young*, 6 H. & N. 329 (1861) per *Wilde J.* It is extraordinary that so decent and sensible a view has been rejected by any court even by *dicta*. While a donee of the use of another's property real or personal perhaps ought not to expect the owner to specially prepare it for his use, yet he is entitled by the usages of decent society to expect that his donor will act in good faith and will not in the guise of giving a favor impose a curse. No such doctrine is applied to the gift of the use of chattels. Even a manufacturer or vendor is liable to the purchaser of his wares through a middleman, if he conceals a defect therein known to him or fails to disclose one, whose existence is not discoverable by such inspection as the purchaser ought to make of the article before using it; *Lewis v. Terry*, 111 Cal. 39 (1896); *Wellington v. Downer Oil Co.*, 104 Mass. 64 (1870); *Elkins etc. v. McKean*, 79 Pa. 493 (1875); *Skim v. Renter*, 135 Mich. 57 (1903); *McCaffrey v. Mossberg Mfg. Co.*, 23 R. I. 381 (1901).

It is astounding to find such a rank exuberance of the landowner's privilege, as that of permitting a landowner, though not an owner of a chattel, to allow those whom he gratuitously permits to use his property to remain in ignorance of conditions which he knows makes the acceptance of his apparent favor dangerous to them, flourishing in America and particularly in New England, originally settled by "pilgrims" who left England to escape the dominance of a landowning aristocracy.

²⁹ It is only in those jurisdictions which still follow Chief Justice Bigelow's opinion in *Sweeney v. Old Colony Railroad* (see ante 69 U. of Pa. Law Rev. p. 246) in so far as it held that a landowner owes no duty to any persons except those whom he invites to come upon his premises, other than to refrain from inflicting upon them wanton reckless or intentional harm, that it is necessary to imply an invitation extended to those entitled to enter the premises to use as an approach so much of the premises, whether wrought way or front yard, as is made to appear to be the usual means of access to the premises. *Learoy, executor v. Godfrey*, 138 Mass. 315 (1885) and *Gordon v. Cumming*, 152 Mass. 513 (1890).

It is submitted that the owners apparent preparation or appropriation of a part of his premises as the approach to the buildings thereon is taken to amount to an "invitation" which is important, not as creating a right to enter the premises, but as justifying one, otherwise entitled to enter without either

licensee. It is enough that the conditions are created or maintained by the owner, and that he actually permits persons, who have no reason to expect to encounter such perils, to use a part of his premises where he knows they exist. It is only when the injured person is a trespasser that he must prove that the trap was prepared in anticipation of his intrusion and for the purpose of injuring him if he does intrude. This liability is not confined to the

invitation or permission, to assume that the particular part of the premises over which he makes his entry, having obviously prepared or set aside by the owner as an approach, will not have upon it any conditions not usual to such approaches. Apparently the term "invitation" is used to give conformity to the opinion in *Sweeney v. R. R.*, which up to that time had not been modified in Massachusetts, as it later was, by adopting the English view that the owner's interest in the visit and not the fact of invitation was the distinguishing factor between *business* "invitees" and *bare* "licensees." But recognizing the sense in which the term "invitation" is used, and the effect given it by Mr. Justice Holmes, the decision in *Learoyd v. Godfrey* is in substance to the same effect as that of the New York Court of Appeals in *Meiers v. Koch Brewery*.

In England and in those American jurisdictions which follow its more humane and sensible view, it should be enough that the plaintiff being upon the premises of right encountered and was injured by a "trap" knowingly created or maintained by the owner thereon.

Even in those jurisdictions, and they are many, in which Chief Justice Bigelow's opinion is followed in so far, but only in so far, as it divides persons admitted by an owner into sheep and goats, "invitees" and "licensees," but makes the test of the right of admission to the favored class depend upon the owner's interest in the visit rather than upon the fact that he has suggested it by word or preparation, it is submitted that it is entirely proper to give to the preferred status of "business invitees" to those public officers, whose entry the owner is bound to tolerate because the character of his business, like that in *Anderson et c. Co. v. Hair*, 103 Ky. 196 (1898) and "*The City of Naples*, 69 Fed. 794 (1895), makes it unlawful for him to carry it on without government inspection. Still more would it be so, where an owner to secure good order at some exhibition held or game played on his land, procured for the protection of his patrons the attendance a corps of policemen. So, a steamship company can not lawfully land its foreign passengers or freight without the presence of custom house officers and therefore their presence when a vessel docks is as closely connected with the company's business use of its land as the visits of innumerable kinds of visitors who are held to be "business invitees," are connected with the owner's use of other business premises. But it is perhaps doubtful whether a customs officer lurking upon a dock at night to detect possible smuggling ought to be so treated. It would seem that his entry was not necessary for the lawful carrying on of the company's business. The nature of their business made it probable that smuggling might be done there, but equally freight yards are notoriously the scene of a great deal of theft and pilfering and fights are apt to occur in bar-rooms. Yet it would be far fetched to hold that the entry of the police to catch a thief or to stop a fight was ancillary to and for the purpose of the railroad's use of its yards or the saloon keeper's use of his bar-room.

owners and occupiers of land, it attaches to "any person who creates such a 'trap' upon the land of another."³⁰

Even those courts who deny to persons entering another's premises in the exercise of some independent right of their own a protection equal to that which they grant to those who enter by the owner's invitation and for his business purpose, should not deny to them at least the same protection which they accord to a bare licensee in whose visit the owner has no interest. At the least, they are in the premises rightfully and should not be placed under the disadvantages properly imposed upon trespassers, who unlawfully appropriate to themselves the use of another's land.

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³⁰ "If a person creates a dangerous condition of things (something in the nature of a concealed trap) whether in a public highway or on his own premises or on those of another and he sees some other person who, to his knowledge, is unaware of the existence of the danger, lawfully exposing himself or about to expose himself to the danger which he has created, he is in duty bound to give such person a warning," *Bankes, L. J., Kimber v. Gas Light & Coke Co., Ltd., L. R. (1918) 1 K. B. 439 p. 444.*

If, as in *Corby v. Hill*, 4 C. B. N. S. 556 (1858), the danger so created is so far permanent as to continue after the creator has left the place, he must place equally permanent physical warnings, in that case lights, to show the presence of building material piled in private driveway.

It may be suggested that a person having the right to go upon the premises of another irrespective of the owner's consent should in some respects be in a more favorable position than even a business guest, and that under the broad principle announced in *Meirs v. Koch Brewery*, even notice, as by lighting, might not be a sufficient performance of the owner's duty. To him the doctrine of voluntary assumption of risk ought not to apply, since the owner can not exclude him. He cannot even by notice of the danger force him to an election to forego his use of the road or to take upon himself the risk of the dangers involved in its defective condition. It would seem that it would follow from the reasoning of the court that he would be entitled to recover had he known of this coal hole and had been injured in attempting to pass it unless the danger was so manifest and great that the importance of his errand would not justify him in running it, or unless he had not taken that additional care in attempting to pass the obstruction which its dangerous character required. It may be further suggested that if there was no other way of reaching the fire the danger to the whole community of a conflagration would justify him in taking a heavy chance in attempting to use the only available road.