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LIABILITY OF POSSESSORS OF PREMISES.

INTRODUCTION.

In this and succeeding articles[1] the attempt is mainly to collect and discuss the Canadian cases on the subject of the liability of a possessor of premises to persons coming on such premises.

A. SCOPE OF ARTICLES.

It is not the writer's purpose to deal with the liability of a possessor to *all* persons who may come upon his premises. Where there is a special relationship between the possessor and the visitor such as that of master and servant, landlord and tenant, etc., a consideration of the duties and liabilities of the possessor arising out of such relationship is not attempted except incidentally. It is only the liability of a possessor *quâ* possessor that is considered.

B. CLASSIFICATION.

For purposes of these articles persons coming on another's premises has been classified in three groups, viz., trespassers, licensees and invitees. A word should perhaps be said here as to this threefold classification. Persons coming on another's premises may be broadly divided into two great classes—those who enter wrongfully anl those who enter lawfully.[2]

Persons who come on premises wrongfully are trespassers. No dispute is likely to arise as to the significance or the appropriateness of that term. Persons who come on premises lawfully have been

[1] This is the first of a series of articles by Professor Macdonald dealing with the liability of possessors of premises. The present article deals with certain preliminary matters and with the liability of a possessor to adult trespassers. Subsequent articles will deal with liability to children, licensees and invitees.

[2] Bohlen, 69 U. of P. Law Rev. 252; Salmond, Torts, 7th ed., 451.

variously designated. Undoubtedly all such persons can be called broadly *licensees*,[3] but English and Canadian cases have seen fit to restrict the term *licensee* to a certain class of persons lawfully entering premises, namely, that class which enters for some purpose in which the possessor has no business concern directly or indirectly. On the other hand where the visitors come to the premises for some business purpose in which the possessor is concerned, they are, by the almost universal Canadian and English nomenclature, termed *invitees*.

It must be admitted that the term *invitee* is not a happy one and judges have more than once lamented what has been termed the "deficiency of the English language"[4] which necessitates the use of such a word. It carries with it the idea of invitation by the possessor as being a decisive factor in placing a visitor within the class known as invitees, whereas as will appear later, not the invitation of the possessor, but the nature of the purpose with which the visitor comes to the premises, is really decisive. The habit of taking a word and straining its plain ordinary meaning in order to use it in a legal definition or a legal setting is unfortunate, and confusing. On the other hand perhaps no better word can be had. The phrase "business visitor" which is often used, particularly by American writers, has the merit of conveying at once the essential idea of business, but it does not indicate whose business is referred to. If a visitor comes to premises on business entirely of his own concern, he would not be a business visitor in the sense in which that term is generally used in cases and articles, yet would he not in fact be a business visitor? If the term invitee is objectionable because not every one who is an invitee in fact is also an invitee in law, so likewise the term business visitor seems to be open to a similar objection. In some respects the term "customer" is suitable but while the terms "invitee" and "business visitor" are too wide, customer is too narrow. Strictly speaking, it is applicable to such persons as go on premises for purposes of the possessor's business conducted on such premises. As Willes, J., said:[5] "the common case is a customer in a shop." But the class with which we are now concerned includes many other persons, as Willes, J., went on to point out, and as Courts have repeatedly declared since *Indermaur* v. *Dames* (*supra*).

[3] We exclude from consideration, temporarily, persons who are privileged to enter land irrespective of the owner's consent. They are there lawfully but not by the license of the possessor, e.g., a policeman pursuing a felon.

[4] See Lord Buckmaster in *Fairman* v. *Perpetual etc. Society* [1923] A.C. 74 at p. 80.

[5] *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274.

It must be confessed that the terminology of this part of the field of law is not satisfactory, but it has become part of the warp and woof of English and Canadian legal thinking. Thus, in *Latham* v. *Johnson*,[6] Hamilton, L.J. (now Lord Sumner), said:

> Where a question arises, not between parties who are both present in the exercise of equal rights *inter se*, but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognized three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured . . . Contractual obligations of course stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee.

In *Norman* v. *Great Western Railway*,[7] Buckley, L.J., said:

> The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a trespasser . . . The next is the case of a licensee . . . Next in the ascending scale is the invitee.

In *Addie & Sons* v. *Dumbreck*,[8] Lord Hailsham, L.C., said:

> There are three categories in which persons visiting premises belonging to another may fall. They may go, (1) by the invitation, express or implied of the occupier; (2) with the leave and license of the occupier, and (3) as trespassers.

In the *Norman* case,[9] the Court of Appeal expressly denied that there was, as contended by counsel for the plaintiff, a fourth class in this ascending scale, namely, the class which a possessor is bound to admit to his premises.[10]

There have been attempts not only to add a fourth category of visitors to premises, but to subdivide some of the old categories into

[6] [1913] 1 K.B. 398 at p. 410 (C.A.). In *Fairman* v. *Perpetual etc. Society*, [1923] A.C. 74 at p. 80, Lord Buckmaster described Hamilton, L.J.'s statement as "concise and accurate." It was also adopted by Viscount Dunedin in the *Addie* case, *infra*, note.

[7] [1915] 1 K.B. 584 at p. 591 (C.A.).

[8] [1929] A.C. 358.

[9] The case has been criticised on this point in England—See discussion of the matter in a subsequent article under the topic "Invitees."

[10] There is, however, by the preponderance of authority, a fourth class of visitors, namely, those who pay for the right to enter. To them a higher duty is said to be owed than to invitees. The leading English case as to this class is *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501, and the leading Canadian case *Stuart* v. *Cobalt* (1909), 19 O.L.R. 667. Such liability, however, is said to rest on an implied warranty that the premises are safe and to be therefore contractual in nature. Cases of this type are discussed later on in connection with invitee cases.

different classes. Thus, Mr. L. V. Holt in the *Law Quarterly Review*,[11] divides persons entering premises into six classes—those entering under an implied warranty of safety, requested invitees, unrequested invitees, invited guests, bare licensees, trespassers. Sir Frederick Pollock, then editor of the *Law Quarterly Review*, in a note to Mr. Holt's article, observes that it is difficult to see "why justice and convenience should require such minute distinctions." Sir Frederick Pollock's criticism fairly represents the common attitude of English Courts to the problem. The classes have been recognized and defined, the duties owing to members of these classes have been set out, and unless a visitor can bring himself within the appropriate class and show a breach of duty to members of that class, he cannot recover. If one had sufficient classes this method might be made to work out with some degree of satisfaction. But cases arise which do not fit well into any of the three categories. What, for instance, shall be said of the person who in common with others has been walking, let us say for a year, over a path on another's land, to the knowledge of the other but without objection from him, though he really dislikes to have people use his land in this way? Is the person using the other's land a trespasser or is he a licensee? Certainly he is not, by the mere fact of the possessor's not objecting, necessarily a licensee. Yet some of our Courts feeling that such persons should not be treated as trespassers, have called them—what often they were not—licensees, and allowed recovery on that basis.[12] And what of children who trespass? English and Canadian Courts have repeatedly said that a child trespasser is a trespasser still even though a child. But, conscious of the harshness of such a doctrine, our Courts, by speaking of "allurements" and "invitations" when there is really no evidence of either, often make it an easy matter to take a child out of the trespasser class. The facts are made to fit the conception, instead of having the conception fit the facts. By this Procrustean method, the three categories are preserved intact even though reason and experience be sacrificed in the process.

We shall return to this phase of the problem in a later article. In the meantime, the liability of possessors of premises will be treated

[11] 32 Law Q. Rev. 160.

[12] See *Lowery* v. *Walker*, [1911] A.C. 10. There, the defendant had put up a notice and had also interfered with people crossing his field. The speeches in the House of Lords however contain such expressions as "the plaintiff was there with the permission of the defendant;" "the (defendant) has acquiesced in their crossing." These are "hard sayings" in view of the actual facts of the case.

in the traditional English and Canadian method—by classifying visitors to premises as trespassers, licensees and invitees.

C. Who is Liable?

A preliminary question would seem to arise as to the incidence of liability in actions of this kind. This is a question not frequently discussed in the cases, and in the rules laid down by courts fixing the duties owed to the different classes of visitors to premises, the words owner, occupier and possessor[13] are frequently used without distinction. In many cases the same person is at once owner, occupier and possessor. In a larger number of cases occupier and possessor mean the same person. But where possession is severed from occupancy and from ownership, the question as to who should be subject to liability becomes important.

The true rule is that liability for the condition of premises falls on the person in possession. Thus, Salmond[14] says: "The person responsible for the condition of premises is he who is in possession of them for the time being whether he is the owner or not."

"The duty," says Pollock[15] "is founded not on ownership but on possession," in other words, on the structure being maintained under the control and for the purposes of the person held answerable.

That this should be the law seems obvious enough. It is the possessor who is in control of the premises, it is he who permits or forbids entry upon the premises. It is with him that the relationship of trespasser, licensee or invitee is created and it is to him that the trespasser, licensee or invitee should look if the duties arising out of these relationships have not been performed.

The owner may in some cases be also liable. So, in *Kimber* v. *Gas Light and Coke Co.*,[16] Bankes, L.J., said:

> If a person creates a dangerous condition of things (something in the nature of a concealed danger), whether in a public highway, *or on his own*

[13] The meaning given to the term "possessor" in this paper is that adopted by the American Law Institute in the Restatement of the Law of Torts, Tentative Draft No. 4 (April 6th, 1929), p. 127. Possessor is there defined: "(a) a person who is in occupation of land with intent to control it, or (b) a person who has been in possession of land with intent to control it; if no other person has obtained possession under the provisions of clause (a) after such person has ceased his occupation, or (c) a person who is entitled to immediate occupation of the land if no other person is in possession, under the provisions of clauses (a) and (b).

[14] Torts, 7th ed., 445.

[15] Torts, 12th ed., 516.

[16] [1918] 1 K.B. 439 at p. 445. And see *Corby* v. *Hill* (1858), 4 C.B. N.S. 566, where the defendant was not in possession but had created a hidden danger on the premises and was held liable to the plaintiff, a licensee of the occupier.

premises, or on those of another, and he sees some other person who to his knowledge is unaware of the danger, lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning.

It will be noted that the liability here attaches only to *acts* of the owner. In cases of this kind, the possessor may also be liable, if he knew (or in some cases if he ought to have known) of the danger and omitted to take proper precautions for the safety of visitors.

Trespassers.

The preliminary question whether a person is a trespasser or not is a question for the jury. In *Makins* v. *Piggott and Inglis,*[17] King, J., delivering the judgment of the majority of the Supreme Court of Canada, said:

> A question was raised as to whether the place where the caps (detonating caps) were found was a place where the plaintiff had no right to be. This however (as stated by the judges of the Court of Appeal) was, upon the evidence a question for the jury.

And in *Grand Trunk Ry.* v. *Barnett*[18] the Privy Council said:

> There is sometimes difficulty in deciding when a man is a trespasser. That is a question of fact and in the present case it has been decided against the plaintiff by a jury properly directed.

In *King* v. *Northern Navigation Co.,*[19] the Ontario Divisional Court decided that the plaintiff in that case was a trespasser, and though the Court referred to the *Barnett* case and adopted the rule in the latter case that a man trespasses at his own risk, it overlooked the statement of the Privy Council that whether or not a man was a trespasser was a question of fact. *King* v. *Northern Navigation Co.* (*supra*) has been criticized on this point[20] and cannot now be taken to represent correctly the law, in the face of definite pronouncements by the Supreme Court of Canada and the Privy Council.[21]

What is the duty owed to a trespasser? That is the typical form of question which Canadian and English Courts address to themselves

[17] [1898] 29 S.C.R. 188 at p. 192.

[18] [1911] A.C. 361. See also *Munro* v. *Pinder Co.* (1925), 52 N.B.R. 487.

[19] (1911), 24 O.L.R. 643 at p. 650.

[20] 48 Can. L.J. 41.

[21] See 27 O.L.R. 69, where the Ontario Court of Appeal affirmed the result in 24 O.L.R. 643, Garrow, J.A., thought that plaintiff was a "bare licensee," 27 O.L.R. 69 at p. 74.

when an injured trespasser seeks recovery.[22] Stated in so general a form, no answer can be given to such a question. There are several factors to be considered and in all such cases it is submitted that the following questions must be answered:

1. Was the trespasser a child or an adult?
2. Was the fact of the trespasser's presence known or unknown, anticipated or not anticipated?
3. Was the injury caused by some act by the possessor, or was such injury brought about by some condition of the premises?

On the answers to the above questions depends the answer to the general question referred to at the beginning of this paragraph. In other words, the question which the Courts should ask themselves ought to be: What is the duty owed by the possessor of this land to this particular trespasser? Failure to keep in mind the necessity of certain fundamental distinctions has led to the application of improper tests in many cases and while correct results are often reached in spite of such tests, such a mode of procedure cannot be regarded as satisfactory.

The first distinction to be kept in mind is that between adult and child trespassers. The adult trespasser, at best, is not fancied by Courts; the child trespasser, in some cases, is placed almost at the head of the class of persons who come on another's land—that is, he is sometimes placed in the position of an adult invitee. We shall first consider the position of adult trespassers; (1) According as they are known or unknown, anticipated or unanticipated. (2) And according as they are injured by an act of the possessor or by some condition of the premises.

Adult Trespassers.

The law for Canada as to unknown adult trespassers has been stated authoritatively by the Privy Council in *Grand Trunk Railway* v. *Barnett*.[23] In that case Barnett, while riding on a train of the Pere Marquette Company in defendant's yard, was injured in a

[22] [Deceased] "was a mere trespasser to whom dependants owed no obligation or duty:" Girouard, J., *Roberts* v. *Hawkins* (1898), 29 Can. S.C.R. 218 at p. 225. "The respondent was a trespasser and the question is, what . . . are his rights against the appellant company:" Lord Robson in *G. T. Ry.* v. *Barnett*, [1911] A.C. 361 at p. 369. "We must ask in each case whether the man or animal which suffered had or had not a right to be where he was when he received the hurt. If he had not, then unless the element of intention to injure . . . or of nuisance . . . be present, no action is maintainable:" *Smith* v. *Hayes* (1898), 29 O.R. 283 at p. 307, quoting from *Deane* v. *Clayton* (1817), 7 Taunt. 489. See also Charles, J., in *Ponting* v. *Noakes*, [1894] 2 Q.B. 281.

[23] [1911] A.C. 361.

collision caused by the negligence of the defendant's servants. At the trial the jury were asked whether Barnett was on the train with the permission of the Pere Marquette Company, and they answered, No. It was contended by Barnett's counsel that the jury should have been asked the further question whether Barnett was on the train with the permission of the Pere Marquette Company's servants. The Ontario Divisional Court regarded this as a "vital question" [24] and the Ontario Court of Appeal affirmed that opinion.[25] The Privy Council, however, said that evidence as to whether plaintiff had permission from a brakeman (who had no authority to give such permission) was unimportant in this particular case. The appeal by the Company was allowed and the plaintiff was held not entitled to recover. Lord Robson, who delivered the judgment of their Lordships, said:

> The case must therefore be taken on the footing that the respondent was a trespasser and the question is what under those circumstances are his rights against the appellant Company? . . . . The Railway Co. was undoubtedly under a duty to the plaintiff not wilfully to injure him: they were not entitled unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances.

In the *Barnett* case there was no finding by the jury, and no suggestion that the Grand Trunk Railway Company's servants were aware of Barnett's actual or probable presence on the train. Whatever he may have been to the Pere Marquette employees, he was as to defendants' servants, an unseen and unknown trespasser. Bearing that fact in mind the result would seem to be clearly correct.

The reasoning in the case may perhaps not be so acceptable. The Privy Council speaks of "a duty not wilfully to injure" the plaintiff. But if defendants did not know and need not have presumed the plaintiff's presence, it seems misleading to speak of a duty to him. "How could one use care towards a person or an object whose existence was unknown or unheard of?" [26] Properly speaking, the duty not to inflict wilful injury is a duty that presupposes knowledge of the plaintiff's presence, and then "something more than ordinary inadvertence" [27] on the part of the defendant. In other words, defendants

[24] 20 O.L.R. 397.
[25] 22 O.L.R. 84.
[26] "Duty to seen Trespassers." R. J. Peaslee, 27 Harv. L. Rev. 403; Harvard Essays 343.
[27] *Bjornquist* v. *B & A. Ry.*, 185 Mass. 134; *Diplock* v. *C. N. Ry.* (1916), 53 S.C.R. 376 at p. 381, (Davies, J.); at p. 389 (Anglin, J.).

have a choice of injuring or not injuring the plaintiff. They wilfully or wantonly inflict injury on him. In such a case, all Courts would undoubtedly impose liability on defendants. But when the trespasser's presence is not actually known to defendants nor presumable by them, there is no choice open to them, for "a choice which entails a concealed consequence is, as to that consequence, no choice." [28]

The phrase "to increase the normal risk by deliberately placing unexpected dangers in his way" is open to the same suggestions as those made regarding the phrase "not wilfully to injure." As a statement of the law with reference to seen trespassers it is accurate, as to unseen trespassers, it seems inappropriate.

What would be reasonable care toward a trespasser? The Privy Council, in the part of their opinion first quoted, felt that to impose liability for ordinary negligence to trespassers would be to put trespassers and passengers on the same footing. This does not seem to be a necessary conclusion. As is pointed out by Judge Peaslee in the article already referred to,[29] the trespasser is in a less favourable position than a passenger or other invitee in two respects: First, the trespasser must show that he was powerless to avert the accident while the defendant could have averted it. The example given by Judge Peaslee is that of a trespasser walking along a single track railroad which he can step off at any time. After the engineer is powerless to stop the train the trespasser can still avoid the accident by leaving the track. If he fails to do so he cannot recover. On the other hand, if the trespasser is on a trestle from which safe escape is impossible, the entire situation is in the hands of the engineer and he must take whatever steps are necessary to avoid the accident, that is, he must stop his train.[30] The second difference noted by Judge Peaslee is that the care owed to a trespasser "may be and probably is" less than the care owed to an invitee. In each case it is the care of the ordinary man that is required, but the ordinary man does not take so much care for the safety of a trespasser as for the safety of an invitee. This statement seems accurate, in two

[28] Holmes, Common Law, p. 94.

[29] 27 Harv. L. Rev. 403; Harvard Essays 345, 346. The present writer has found Judge Peaslee's article highly valuable.

[30] Where the trespasser is, to the knowledge of engineer, oblivious to the danger, the engineer is under the same duty. In *C. P. Ry.* v. *Hinrich* (1913), 48 Can. S.C.R. 557, the Supreme Court of Canada said that where an engineer knows that a trespasser is oblivious to his danger, the engineer must apply his brakes and endeavor to avert the accident, and that failure to do so might be "a determining cause of the accident" and the trespasser's negligence would be immaterial.

senses: First, the possessor should not be required (except where the trespasses are habitual and on a definite area) to anticipate the presence of trespassers, and hence he need not have them in mind when he makes preparations for doing something on his premises. He is required to anticipate the presence of invitees and he must prepare to carry on activities on his land with them in mind. Secondly, a possessor is entitled to presume that a trespasser will be more on the alert for his own safety than an invitee will. The invitee is entitled to presume that the premises have been put in safe condition, or if not, that he will be warned of unusual dangers thereon. The trespasser cannot validly make any such presumption.

The Privy Council declared in the *Barnett* case that there was no authority for saying that the railway company should be liable to a trespasser for the negligence of their servants. They overlooked the old case of *Degg* v. *Midland Railway*[31] where Bramwell, B., said: "Probably, if the occupier were sporting or firing at a mark on his land, and saw a trespasser and fired *carelessly* and hurt him, an action would lie," and the later case of *LeLievre* v. *Gould*[32] where Lord Esher, M.R., said: "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

Their Lordships give, as one reason for their conclusion, that "a carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as for instance by a charge to cover insurance against the risk) for there can be no contracts with trespassers."[33] Something of the same sort was suggested by Brett, M.R., in *Batchelor* v. *Fortescue*.[34] As to this, the comment of Beven is interesting. He says:[35]

> These expressions (in *Batchelor* v. *Fortescue*) might suggest that towards a trespasser there is no duty; but this is not so either in law or in reason. Where the safety of life and limb is involved more serious responsibility

[31] (1857), 1 H. & N. 780.

[32] [1893] 1 Q.B. 497. It is worthy of note that in *Lowery* v. *Walker*, decided by the House of Lords only a few months before the Privy Council's opinion in the *Barnett* case, Lord Shaw said that he was not "in any respect assenting to the pronouncements by Darling, J., and Vaughan Williams, L.J.," as to trespassers. Darling, J., had said in the Divisional Court, [1909] 2 K.B. 433 at p. 435, "towards trespassers there is a duty not to intentionally injure, there is no duty to take care." Vaughan Williams, L.J., had held in the Court of Appeal, [1910] 1 K.B. 173, that under the circumstances of the case there was no duty on the part of defendant to take care for the protection of people crossing the field.

[33] [1911] A.C. 369 at p. 370.

[34] (1883), 11 Q.B.D. 474 at p. 479.

[35] Negligence, 4th ed., 567.

intervenes than in other cases. The existence or non-existence of a contract cannot be a wholly adequate measure of the responsibility of one man with reference to another, and . . . . if, in full sight of defendants' servants, he (deceased) were there (in a dangerous place), they were in a different position with regard to the continuance of operations known to them to be dangerous, than if he were not.

Their Lordships would require some wilful act "involving something worse than the absence of reasonable care." They did not attempt to define reasonable care, but cases arising in Canada, since the *Barnett* case, while purporting to follow it, have in the case of seen trespassers, interpreted ordinary negligence after the trespasser's presence is known, to be a lack of reasonable care.[35a] The first of such cases is *Bondy* v. *Sandwich Railway Company*.[36] There a trespassing horse was killed by defendant's electric car. The jury found that the motorman should have seen the horse in time to stop the car, and the evidence was that after seeing the horse the motorman had done everything possible to stop the car. Falconbridge, C.J., said:[37]

> The whole point of this case is, whether the defendants were under any obligation to keep a lookout for trespassers on their tracks—no negligence being proved or found after the presence of the horse was discovered. Under the cases, the defendants were not under any such obligation.

Riddell, J., after quoting from 36 Cyc. 1487,[38] said:[39] "I think the sole duty to the plaintiff arose when the horse was discovered."

The practice, in actions by trespassers, of laying down one rule at one time and then modifying it in the same case by a less rigorous rule is to be found in *De Vries* v. *C. P. Ry.*,[40] a decision of the Manitoba Court of Appeal. There, plaintiff's horses were killed by defendant's train while plaintiff was driving over the railway line at a non-public crossing where such driving was expressly forbidden by warning notices. There was no evidence that defendant's engineer saw the horses. The trial judge non-suited the plaintiffs and the Court of Appeal held the non-suit proper. Cameron, J.A., said: "It is not possible to say that there was any evidence whatever of wanton, reckless or wilful conduct on the part of

[35a] In the first quotation from the *Barnett Case* (*supra*) the Privy Council declares that broadly, there is never liability to a trespasser for negligence.

[36] (1911), 24 O.L.R. 409.

[37] (1911), 24 O.L.R. 409 at p. 410.

[38] "As a general rule a street railway company is under no duty to keep a lookout for trespassers on its track . . . . at points at which it has a right to assume that the track is clear . . . . but its only duty is to use all proper precautions to avoid injuring such a trespasser after discovering his peril . . . . ."

[39] (1911), 24 O.L.R. 409 at p. 413.

[40] (1916), 27 D.L.R. 20.

the engineer, or *any evidence that after he discovered the presence of the plaintiff he failed to exercise reasonable care* to avoid injuring him or his property." The last alternative, it is submitted, is the proper one.

In *Diplock* v. *Canadian Northern Ry.*,[41] a case arising in Saskatchewan, plaintiff and one Thacker, were stealing a ride on defendant's train. They were standing on a narrow ledge between the tender and the baggage car. A brakeman, while the train was in motion, pushed Thacker who struck against plaintiff. The plaintiff was thrown off the ledge and injured. The brakeman did not see the plaintiff but he "assumed" that both trespassers were on the ledge.[42] The Supreme Court of Saskatchewan, following the rule in the *Barnett* case, asked themselves: Did the brakeman wilfully injure plaintiff or unnecessarily and knowingly increase the risk? Under the circumstances they held that "a reasonable man would have known that by pushing Thacker he was increasing the danger to the plaintiff." The Court seems to fall into the common error of confusing wilful injury with unreasonable conduct, but in the result the case turns on what is submitted to be the correct principle, viz.: the reasonableness of the defendant's conduct after the presence of the trespasser has been discovered.

A case very similar to the *Diplock* case is *Brown* v. *Canadian Pacific Railway*.[43] There a conductor ordered the plaintiff to get off the train, using violent language and walking toward the plaintiff. Plaintiff was injured in getting off. The Ontario Divisional Court held that though the plaintiff was unlawfully on the train, that circumstance did not entitle the conductor "to force him off the train," when it was travelling at such a speed that the attempt to get off "might reasonably have been attended with danger to the plaintiff."

The latest case in which the Supreme Court of Canada had to consider the duties owed to a trespasser was *Herdman* v. *Maritime Coal and Railway Co.*,[44] an appeal from a decision of the Supreme Court of Nova Scotia. In that case Dr. Herdman was walking along

[41] [1916], 26 D.L.R. 544; affirmed, 53 S.C.R. 376.

[42] The jury were asked, "Did Wagner (the brakeman) know that Diplock was in the position he was?" and they answered "Dubious." The Saskatchewan Court interpreted this to mean—dubious as to his *exact position* on the ledge. In the Supreme Court of Canada, Anglin, J., said that Wagner had reason to believe that Diplock was somewhere in the narrow space between the tender and baggage car, and in dealing as he did with the other trespasser he wantonly or recklessly exposed Diplock to unnecessary risk. This aspect of the case is interesting in that it shows that a trespasser does not have to be actually *seen* before a duty to him arises.

[43] (1911), 2 O.W.N. 773 at p. 834.

[44] (1919), 59 S.C.R. 127; 49 D.L.R. 90.

defendant's railway track on a cold and stormy night, when he was struck and killed by defendant's engine which had no lights and whose whistle was out of order. The jury found that the proximate cause of the accident was the Company's negligence but that such negligence did not amount to a reckless disregard of human life, that the public habitually used the railway at the point where the accident occurred and that the Company had notice of this practice. The Supreme Court of Canada in its majority judgment held that by virtue of section 264 of the Nova Scotia Railway Act[45] Dr. Herdman was a trespasser. That section says that "every person . . . who walks along the track . . . is liable . . . to a penalty not exceeding ten dollars." The passiveness of the railway company in instituting prosecution under this section was held to be immaterial. Being a trespasser, the majority judgment adopting the strict rule in the *Barnett* case, held that the company did not injure him wilfully, did not "unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in his way." As in the *Barnett* case, the result here seems to be satisfactory, if Dr. Herdman be regarded as a trespasser. If he were a trespasser, he was unknown and unseen, and there was no breach of any duty owed to him. A risk cannot be "knowingly" increased unless there is knowledge of the presence of a person who is subjected to the increased risk.

The *Herdman* case was followed in *Lajoie* v. *The King*,[46] but no other case has been found in which the *Herdman* test was applied. In *MacNeil* v. *Acadian Coal Co.*[47] it was said by the Supreme Court of Canada that the *Herman* case, while a controlling authority in cases exactly similar, ought not to be extended.

Thus far, acts by the defendant have been considered. The endeavour has been made to show that Canadian Courts distinguish between seen and unseen trespassers and that while courts frequently state the duty of a possessor in general terms as being merely a duty not to inflict wanton or wilful injury on a trespasser, they usually expressly modify that rule, in the case of seen trespassers, by quoting the rule requiring ordinary care to be exercised after the trespasser's presence becomes known, or by acting on such a rule without quoting it.

[45] On the question whether plaintiff's violation of the statute should deprive him of the right to recover, see Harold S. Davis: "The Plaintiff's Illegal Act as a Defense in Actions of Tort," 18 Harv. L. Rev. 505; Harvard Essays 558; Thayer: "Public Wrong and Private Action," 27 Harv. L. Rev. 317; Harvard Essays 276; Goodrich, 7 Iowa L.B. 76; Cronkite: Statute Violation by Plaintiff in Tort, 7 C.B. Rev. 67.

[46] (1921), 20 Ex. C.R. 473.

[47] [1927] S.C.R. 497.

As to unseen trespassers, it seems necessary to make a distinction between those whose presence is expected and those whose presence is not to be expected. As to the latter there can be no duty of care,[47a] for reasons already pointed out,[47b] either with regard to acts of the possessor or with regard to the condition of the premises. Thus, in *Krause* v. *Romanowski*,[48] the defendant was held not liable to the plaintiff for the death of plaintiff's trespassing horse from eating poisoned wheat which defendant had strewn on his land to kill gophers. To the same effect is the Alberta case of *McLean* v. *Rudd*.[49]

In *Baldry* v. *Fenton*,[50] Lamont, J., speaking for the Manitoba Court of Appeal, said:

> An owner of land has no duty to a trespasser beyond this: that he must not be allured to the land with malicious intent to injure him, nor must anything be done wilfully to injure him or make the premises more dangerous for him than they otherwise would have been.

The first part of this statement deals with acts; the second with condition of premises. As to acts, the statement follows the orthodox statement on this point. It requires a state of mind that is practically the same as that required for a crime. But as to seen trespassers it appears to be inaccurate.

As to premises, undoubtedly if a man makes them more dangerous than they usually are with the intent to harm a trespasser he is liable for any resulting injury. But if he has no such intent, but nevertheless has a dangerous condition existing on the premises, must he warn known trespassers of such condition? (It is clear that he is not under a duty to a trespasser to make the premises safe, nor even to warn, if the danger is obvious, for he is not under either of such duties to even an invitee). If the condition is a natural condition there is, in the judgment of Scrutton, L.J., in *Coleshill* v. *Manchester Corporation*,[51] a doubt expressed as to whether an occupier who allows persons to walk on his land is under a duty to warn them of dangerous natural conditions on the land. If this doubt be well founded there would seem to be a similar freedom from duty in the case of known trespassers.

[47a] There is of course a duty not to do an act with the intention of injuring a trespasser: *Bird* v. *Holbrook*, 4 Bing 628.

[47b] See footnotes 26, 27 and 28, *supra*.

[48] 3 S.L.R. 274.

[49] (1908), 1 A.L.R. 505.

[50] (1914), 6 W.W.R. 1441.

[51] [1928] 1 K.B. 776 at p. 789 (C.A.). See Bohlen, 69 U. of P. Law Rev. 341: "No one can complain of an injury to his person or property which is due to the unchanged natural condition of another's land."

The examples given by Scrutton, L.J., of what he calls "natural defects" are unstable rocks on a mountain side, and cliffs which are likely to slide. What he would say as to non-natural conditions of premises, does not appear. It may well be that where the danger is from some artificial condition, the possessor is under a duty to warn a known trespasser, at least if the danger threatened is very serious.[51a] The prior act of the occupier or of some one in whose shoes he stands, in creating the artificial condition, is said by some to distinguish the respective liabilities of the occupier in these cases. Such a distinction has been made in cases where the injury results to someone outside the land[51b] and if sound in such cases it would seem proper to apply it to conditions causing injury to persons coming on the land.

Where persons have been in the habit of trespassing to the knowledge of the possessor, Courts have often sought to stretch such knowledge if coupled with failure to take steps to stop the practice, into a license by the possessor. In many cases this seems a wrong method of approach. Often there is no real acquiescence in the practice by the possessor and it seems idle to talk of a license by the possessor where he is unwilling to have people use his premises and has expressed that unwillingness to them.

What many courts seem to feel is that in such cases some higher duty, as to the condition of premises and as to the manner of carrying on activities upon such premises, should be imposed on the possessor. Accordingly they fix on the duty owed to licensees as suitable and call such trespassers licensees. The objection to such distortions of language has already been made. A more satisfactory result would have been reached if Courts had called such persons trespassers but had held nevertheless that there was a duty to them, perhaps not so onerous a duty as that owed to true licensees, but certainly a higher duty than that owed to the occasional unknown trespasser. Such a duty would arise "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." [52]

It is not, however, suggested that in all cases of repeated trespasses a real license may not sometimes develop. The consent necessary

[51a] See extract from Beven, Negligence, footnote 35, *supra*. The writer has seen no case on the point.

[51b] See *Giles* v. *Walker* (1890), 24 Q.B.D. 656; *Sparkes* v. *Osborne*, 7 Com. L.R. 51; *Reed* v. *Smith* (1914), 19 B.C.R. 139; *Patterson* v. *Dollar*, [1929] 3 D.L.R. 38; *Pontardawe R. D. C.* v. *Moore-Gwyn*, [1929] 1 Ch. 656.

[52] Bohlen, 69 U. of P. Law Rev. 251.

to the creation of a license need not be expressed in words. If a jury can reasonably infer from the possessor's conduct, even from his inaction, that he consents to the use of his land, then, as Professor Goodrich says:[53] "the plaintiff will seldom fail on this ground." In all cases of this kind local customs and usage will be important factors. So in the Alberta case of *McLean* v. *Rudd* already referred to[54] it was suggested that an owner might perhaps be liable for injuries suffered by trespassing animals through falling in unenclosed wells on his premises; such liability resting on the special grazing customs of that Province.

Where a license is implied, the licensee would seem to be in the same position before the law as a licensee by express consent. The point is not particularly adverted to in any case that has come under the writer's notice but it seems to be taken for granted that no distinction should be made on the basis of how the license has been acquired.

Taking up the cases on the topic of implied license:

In *Latham* v. *Johnson*,[55] Hamilton, L.J., said:

> Apart from express "license" or express "invitation" conduct may prove either by implication . . . In a frequented neighborhood and where the owner or occupier may be supposed to know that others regularly enter it and he does not object, an open field may be enough to prove that persons who would otherwise have been trespassers in fact enter it by his tacit permission and are licensees.

In the opinion of Charlesworth[56] it is not enough for the occupier to put up notices forbidding trespassing. "He must take some steps to enforce his prohibition, as by turning people back, otherwise they will probably be held to be licensees." This is a much wider statement than that of Hamilton, L.J., who confined licensees by acquiescence to cases where the occupier makes no objection. If he does object, it seems an unwarranted straining of language to say that he acquiesces.

One of the early Canadian cases on this topic is *Grand Trunk Ry.* v. *Anderson*.[57] There, one M. bought a ticket to travel on defendant's railway. He was told that the train could not reach his station that night on account of a snowstorm. The train reached a crossing three miles from M.'s destination and could get no further. There

[53] 7 Iowa L.B. 80.
[54] *Supra*, footnote 49.
[55] [1913] 1 K.B. 398 at p. 410.
[56] Liability for Dangerous Things, p. 273.
[57] (1898), 28 S.C.R. 541.

was no station at this point but trains used to stop there, tickets were sold to and from the point and a room in a section house was made available to passengers. There was no public road from the crossing to the highway and people had to go along the railway in order to reach the highway. M. left the train and while walking on the railway in order to reach the public highway was struck by a train and killed. The Supreme Court of Canada, by a bare majority, held that assuming that people living near the crossing were accustomed to walk on the railway track, there was no evidence that such custom had ever been brought to the knowledge of any officer of the Company having authority to grant such a right. Further, assuming people near the crossing had acquired a right to use the tracks, M. was not one of that class and the privilege had never been extended to him. He was therefore a trespasser.

The *Anderson* case was followed by the Supreme Court of Manitoba in *DeVries* v. *C. P. Railway*.[58] Cameron, J.A., said in that case that knowledge of public user by the defendant engineers or brakemen was "clearly insufficient," and Haggarty, J.A., felt that knowledge or acquiescence by officers of the Company having authority to grant a license should be shown.

In *MacNeil* v. *Acadia Coal Co.*[59] it was said that the doctrine of the *Anderson* case would not be extended, though it would have to be followed in an identical case.

In *Cunningham* v. *Michigan Central Railway*[60] the Ontario Court of Appeal said that knowledge by a brakeman of defendant company that plaintiff was in the habit of coming on defendant's property to look for cars was not enough to establish leave, much less a right.

In *Royle* v. *Canadian Northern Railway*[61] the Court said: "If they (defendants) had been aware that the trail . . . was a public road or was used as such by the travelling public it might be questioned whether they would not be bound to give warning of their trains coming to the crossing."

In *Hinrich* v. *Canadian Pacific Railway*[62] Macdonald,C.J., said: "It is apparent to me, at all events, that the public had been using the place where the accident occurred as a crossing for a long time to the knowledge of the company and that the deceased had leave and license to cross there."

[58] (1916), 27 D.L.R. 20.
[59] [1927] S.C.R. 497.
[60] (1912), 4 D.L.R. 221.
[61] (1902), 14 Man. R. 275.
[62] (1913), 18 B.C.R. 518, affirmed 48 S.C.R. 557.

It would seem from the above cases that user in itself is not sufficient to create a license; there must be at least knowledge of such user by someone who has authority to grant an express license. It should be noted that even though knowledge of the user has not come to such persons as have authority to acquiesce in such user, and there is therefore no license, still, if it is well known to the possessor or to servants of the possessor, such as engineers of trains, that people do intrude habitually over a definite area and in fairly large numbers, then such possessor or servants must act with reference to the probable presence of intruders, and accordingly exercise care at places where intruders are to be expected.[63]

In *Lowery* v. *Walker*[63a] the public had used a track across defendant's field for thirty or forty years. Defendant had occupied the field for the fifteen years immediately preceding the accident and had at some time during his occupancy put up a notice warning off trespassers and had frequently interfered with people crossing the field. He had never taken legal proceedings because most of the people using the field were customers for his milk. Into this field the defendant, without warning, put a horse which he knew to be savage and which attacked and injured the plaintiff. The County Court judge who tried the case delivered an oral judgment and contemporaneously made a note of his judgment in which he referred to the plaintiff as a trespasser, but he held, nevertheless, the defendant guilty of negligence and awarded damages to the plaintiff. Later he changed the note and said that on the question of trespass he came to no conclusion.[64] A Divisional Court reversed this decision interpreting the Judge's finding to be that the plaintiff was a trespasser. The Court of Appeal affirmed the Divisional Court's decision, Buckley, L.J., dissenting. The House of Lords reversed the decision of the Court of Appeal, restoring the decision of the County Court Judge. Their Lordships regarded the plaintiff as being *lawfully* in the field[65] and being in the field lawfully he was entitled to recover.

It seems like a straining of language to say that the defendant in *Lowery* v. *Walker* acquiesced or consented to the intrusions on his field. Would it not be wiser to say, what is the fact, that he did not

[63] Bohlen, 69 U. of P. Law Rev. 251; *Royle* v. *C. N. Ry.*, footnote 61, *supra.*

[63a] [1911] A.C. 10.

[64] See report of case in [1909] 2 K.B. 433.

[65] Lord Loreburn: "the plaintiff was there with the permission of the defendant." Lord Halsbury: "He (defendant) has . . . . acquiesced in their crossing." Lord Atkinson: "The plaintiff was lawfully in the place where the injury happened."

acquiesce but nevertheless that, under the principle suggested by Professor Bohlen, public policy requires that he must act with due care under the circumstances.[66]

Lowery v. *Walker* was followed in the Ontario case of *Breen* v. *City of Toronto*.[67] There the plaintiff was at night hurriedly crossing a boulevard at a prohibited point, where, in spite of the prohibition, the public had formed a path by their habitual crossing. Plaintiff was injured by falling over some blocks which had been left there by defendants. It was held that he could recover, the defendants having imputed knowledge[68] of the user and having created a new danger without warning.

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[66] See footnote 52, *supra*. See Lord Loreburn in *Lowery* v. *Walker*.
[67] (1911), 18 O.W.R. 522.
[68] Knowledge by the defendant's foreman was also considered important.