CHILD TRESPASSERS.[1]

In this article we are concerned mainly with the liability of a possessor for dangerous things left on his premises or for some other dangerous condition of the premises. Only one case has come to the writer's attention where *acts* of a possessor resulting in injury to a child were considered. That case is *Carroll* v. *Freeman*.[2] There the defendant allowed the plaintiff, a boy eight years old, to drive a mower while defendant stood by. Defendant was held liable on the general ground of negligence, the Court saying: "The question whether he (plaintiff) was a trespasser, volunteer or licensee is immaterial."

The real problem presented by cases of trespasses by children is suggested by Boyd, C., in the Ontario case of *McShane* v. *Toronto, etc., Ry.*[3] Boyd, C., said:

> Does the infancy of the plaintiff change the whole situation so that his intrusion on the land of the railway and his unlawful appropriation of and destruction of the chattel to his own injury can be condoned in view of the alleged curiosity of youth, and the natural instinct to possess himself of the little box-shaped signal, and the further youthful impulse to break it open so as to see the inside? So to condone appears to me to place too high a premium on the so-called irrepressible movements of the youthful body and mind, and to impose a servitude on landowners which would prove a cruel and grievous burden.

When Boyd, C., spoke thirty years ago the landowner's interest in the free use and development of his property still weighed heavily in the legal balance, though the great German jurist Ihreing had declared not many years earlier that the old policy of a lower valuing of persons and a high valuing of property was changing into a high valuing of persons and a lower valuing of property. Today we cannot speak with such definite assurance as Boyd, C., spoke of the pre-eminence of the landowner's interest. "There is nothing sacred in the right to use and occupy land."[4] "The position of the owners and occupiers of land in society is not so unique

[1] This is the second of a series of articles by Professor Macdonald on the Liability of Possessors of Premises. The first article dealing with liability to adult trespassers appeared in Volume 7 of the CANADIAN BAR REVIEW at page 665.

[2] (1893), 23 O. R. 283.

[3] (1899), 31 O. R. 185 at p. 187.

[4] Lyman P. Wilson, 57 Am. Law Rev. 877, (1923).

that it cannot be viewed as we view that of other persons engaged in enterprise or activity in a social state."[5] Such statements as the two last quoted are separated by a wide gulf from the pronouncement of Boyd, C., in 1899.

But Boyd, C., saw the problem to be solved even if his solution does not today appear satisfactory. The late Professor Jeremiah Smith stated the same problem in different words:

> Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favour of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land, and the harm which may be done in particular instances by the use of that freedom.[6]

Professor Bohlen saw in the decisions "an effort to hammer out 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."[7] Professor Hudson felt that a solution should be arrived at only "after a careful appraisal and balancing of the various social and individual interests involved."[8] Among the social interests to be considered, Professor Hudson refers to the social interest in the general security and particularly in the security of child life, which has to be weighed against the social interest in the free use of land. The individual interest of the child and of its parents must be considered, but so also must the claim of the occupier of land to be free to develop and use *his* land.

In whatever form the problem be stated, in substance it amounts to a recognition and a weighing of interests or claims and an endeavour to adjust them with the least possible inconvenience to the parties concerned. Failure to recognise the true nature of the problem is responsible for such statements as that it is the "moral duty" of parents to watch over their children, or that "the duty of preventing babies from trespassing on a railway line should lie on their parents and not upon the railway company."[9] Granted that it is the duty of parents to prevent children from trespassing, if nevertheless young children do trespass, the question is what shall

[5] Hudson, 36 Harv. L. Rev. 826; Harvard Essays, 410, (1923).
[6] 11 Harv. L. Rev. 360, Harvard Essays, 368.
[7] 69 U. of Pa. Law Rev. 348. See also Prof. Goodrich, 7 Iowa Law Bulletin 67
[8] 36 Harv. L. Rev. 839; Harvard Essays, 410.
[9] Salmond, Torts, 7th ed., p. 472. Such a form of statement does not add to the high prestige of the late Sir John Salmond's work. It is however retained in the 7th edition which has been edited by Mr. Stallybrass.

be done in these circumstances, not what ought to be done under utopian conditions where children would be models of obedience and parents would be patterns of watchful care.[10] Nor is the solution of the problem furthered by such general statements as that there is no duty owed to trespassers and that "a child will be a trespasser still, if he goes on private ground without leave or right."[11] How does it help matters any to call a child a trespasser? Even if he is a trespasser is there not still the problem whether he ought to be treated as an adult trespasser?[12] Or, whether the prevalence of intruding, among children, and their inability to care properly for themselves should be taken into account? Placing a person in a category and then letting certain consequences follow may be an expeditious manner of dealing with a case but it does not always satisfy the ends of law.

In *Latham* v. *Johnson* (*supra*), Hamilton, L.J. (now Lord Sumner), said:

> Children's cases are always troublesome. . . . Each decision seems clear enough, but to fit them all into their places in the theory of negligence is not so easy.

Canadian cases are no exception to the difficulty noted by Hamilton, L.J. It is difficult to extract any uniform principle from the Canadian Cases on this subject.

The Ontario Courts seem more unwilling than the courts of other provinces to impose liability on possessors of premises for injuries suffered by trespassing children. One of the earliest Ontario cases is *McIntyre* v. *Buchanan*.[13] There a child twelve years old fell into a cellar on a vacant lot near a highway. Recovery was allowed. The case may be put on the ground that an open cellar near the highway was a nuisance.

[10] A more practical view is expressed in the following opinions: "The only principle of law in this case is that where there are children about, it is a right and reasonable thing that the man in charge of the car before starting it, should look to see whether there are any children in such a position that they are in danger of being injured. Very little has been said on the subject of contributory negligence on the part of the parents in allowing the child to play about the street. However it may stand as a matter of strict law, there will always be children playing about the streets." Finlay, L.C., in *Taylor* v. *Dumbarton, etc., Co.* [1918] S.C. 96 (H.L.). Prof. Bohlen, 69 U. of Pa. L.R. 349 refers to the "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."

[11] *Latham* v. *Johnson*, [1913] I. K.B. 398 at p. 416.

[12] See Professor Leon Green, 57 Am. Law Rev. 337-40, for an argument that a young intruding child is not a trespasser.

[13] (1858), 14 U.C.Q.B. 581.

The next case is *Sangster* v. *T. Eaton Co.*[14] There an infant two and one half years old, accompanied its mother to defendant's store, the mother intending to buy clothing for herself and the infant. A mirror fell on the child. The Ontario Divisional Court allowed recovery, holding that the plaintiff was an invitee within the rule laid down in *Indermaur* v. *Dames*[14a] and that even if the child had been guilty of contributory negligence that fact would not bar recovery, nor would the negligence of the mother bar recovery by the child. This case of course does not at all raise the question of trespass by a child.

In *Smith* v. *Hayes*[15] the defendant had a machine for hoisting grain on a lot which was unenclosed on one side. The machine was thirty feet from a highway. During a brief absence of the man in charge of the machine, a child of five years was injured by the machine. There was no evidence that children were in the habit of playing with the machine or that it allured children, or that even if it did allure, that the defendants were so aware. Recovery was denied. Meredith, J. and McMahon, J. (semble) approved the test laid down in *Deane* v. *Clayton*[16] and quoted with approval by Charles, J. in *Ponting* v. *Noakes*:[17]

> 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, indeed, the element of intention to injure, as in *Bird* v. *Holbrook*[18] or of nuisance, as in *Barnes* v. *Ward*,[19] is present) no action is maintainable.

Meredith, J. said further:

> I have not been able to find any case decided by an English Court in which it has been held that the fact of the injured person being a child of tender years enlarges the duty and consequent liability for breach of duty of the owner of machinery placed on his own land though unfenced, where the machinery is not dangerous in itself but liable to become and becoming dangerous when interfered with, beyond that which exists where the person injured is an adult . . . unless the case comes within one or other of these classes.

It is to be observed that the classes referred to included both children and adults and did not distinguish the liability to a child from liability to an adult.

[14] (1894), 25 O.R. 78; distinguished in *Beetles* v. *C.N.R.*, (1929), 63 O.L.R. 537.
[14a] 7 C.B. Rev. 666; (1866) L.R. 1 C.P. 274.
[15] (1898), 29 O.R. 283.
[16] (1817), 7 Taunt. 489.
[17] [1894] 2 Q.B.D. 281 at p. 286.
[18] (1824), 4 Bing. 628.
[19] (1850), 9 C.B. 392.

McMahon, J., while appearing to agree with the law as laid down in *Deane* v. *Clayton* (*supra*) and *Ponting* v. *Noakes* (*supra*) laid down a test of his own which is more favourable to the trespassing child. He said:[20]

> When a machine or instrument is dangerous if left unguarded and is from its nature alluring to children and if (it is) left in a public street or public place or in such close proximity thereto as to be easily accessible to them, and if it is known to the owner that children are in the habit of resorting to such place, he may be held guility of negligence and liable for an accident resulting therefrom.

McMahon, J.'s test would include cases which are not nuisances or cases of intention to injure, and is therefore wider than the test laid down earlier in the case.[21]

In *McShane* v. *Toronto etc. Ry.*,[22] plaintiff, a boy of twelve, went on the defendants' land which adjoined a highway and found a fog signal which he struck with a stone. He was injured by the resulting explosion. The trial judge withdrew the case from the jury and the Ontario Divisional Court affirmed his ruling. The test laid down in *Deane* v. *Clayton* (*supra*) and *Ponting* v. *Noakes* (*supra*) was again referred to and followed, and it was held that there was no intention to injure and no nuisance because the fog signals were harmless as they stood. The whole injury was caused by the plaintiff's unauthorised act and he was old enough to judge between right and wrong.

In *Ricketts* v. *Markdale*,[23] a child of seven was killed by the fall of some logs while playing on a pile of logs on the side of the highway. The Ontario Divisional Court allowed recovery against the village which had allowed the logs to be piled.

In *Newell* v. *C. P. Ry.*,[24] a child of eight was killed by the defendants' train, 400 feet from where he entered the defendants' yard. Defendants had no fence around their yard. It was held that there was no reasonable connection between the absence of the fence and the accident, and as no other negligence had been shown against the defendants, recovery was denied.

Pedlar v. *Toronto Power Co.*[25] was a case where an infant of two years climbed out on the defendants' trestle, fell off and was

[20] 29 O.R. 308.

[21] Unless the doctrine of nuisance be extended to cover cases of things easily accessible from the highway.

[22] (1899), 31 O.R. 185. Cf. *McWilliams* v. *Hunter & Clark*, [1926] Sc. L.T. 185, a somewhat similar case, where recovery was denied.

[23] (1899), 31 O.R. 180, 610.

[24] (1906), 12 O.L.R. 20.

[25] (1913), 29 O.L.R. 527.

drowned. Middleton, J., adopted the reasoning of Farwell, J., in *Latham* v. *Johnson* (*supra*) and said:

> There was no allurement "in the evil sense of alluring with malicious intent;" no trap, for everything was as it seemed, the danger was open and apparent; no invitation, but, on the contrary, a forbidding of children to go upon the trestle . . . no dangerous object placed upon the land, . . . but merely a lawful user by the owner.

He distinguished the *Cooke* case[26] on the ground that there was a license and an allurement there. It seems highly doubtful if in the cases where allurement is considered, it is to be regarded as essential that there should be malicious intent,[27] and it was not suggested that there was any such intent of the defendants in the *Cooke* case. Furthermore, to speak of traps, apparent dangers, and invitations with reference to a child of two years seems like attributing to such child an unusual precocity.

In *Robinson* v. *Havelock*,[28] a defendant owned land abutting on a highway and employed one L. to haul gravel from the land. L. knew that children resorted to the gravel pit to play. Three children were killed by a fall of earth in the pit. The jury found that the defendant neither know nor ought to have known that children might be injured in the pit. This lack of knowledge of the defendant was held fatal to the plaintiff's claim. Knowledge of L. was held not to be knowledge of the defendant.

In *Shilson* v. *Northern Ontario Light & Power Co.*,[29] the absence of knowledge by the defendants that children were in the habit of trespassing was held to be a good defence. The *Cooke* case (*supra*) was said to apply when there was something dangerous to children on premises and defendants know that children resort there. The Ontario Court further said that "that doctrine (in the *Cooke* case (*supra*)) has, in my judgment, been pressed in that case to the utmost limit."

Smith v. *City of Welland*[30] extended the doctrine of no liability to a trespasser to cases analogous to trespass. A boy eleven years old was pulling a toy wagon on a sidewalk, in contravention of a by-law. Turning to free the wagon from some obstruction, he fell into an excavation in the street. Orde, J. at the trial said that while the boy was not a trespasser yet his act was analagous to tres-

[26] [1909] A.C. 229.
[27] "We need no new rules of law to care for a man who would actually do such an act" ("allure," "entice," etc.): Goodrich, 7 Iowa L.R. 67. But see 124 L.T.R. 138.
[28] (1914), 32 O.L.R. 25.
[29] (1919), 45 O.L.R. 449.
[30] [1922] 64 D.L.R. 349.

pass and was the proximate cause of the accident. A child trespasser he said "is not entitled to recover, merely because defendant has been guilty of negligence unless there has been some allurement held out."

In *Wallace* v. *Pettit*,[31] the Ontario Appellate Division considered the whole question of child intruders. A door in a building under construction had been left open. A number of boys were playing "fox" around the building, when one of the boys, eleven years old, endeavouring to find the "fox," ran into the building through the open door and fell down an open elevator shaft. Meredith, C.J. said:

> An infant trespasser . . . is in the same position as an adult trespasser. . . . But an infant may not be a trespasser when and where an adult would be a trespasser . . . in some cases leave would be granted to an infant when it would be refused to an adult. The question is one of fact.

Riddell, J. said:

> There is no greater liability of the owner of property towards children than towards adults. . . . If the landowner place or leave upon his land anything that would naturally attract children . . . without taking efficient means to keep them off, he may therefore be held to have invited or licensed them to come upon his property.

Logie, J. said:

> In order that the doctrine of allurement may be applied, it must be shewn that the thing which caused the injury was an allurement to children, that they were in the habit of frequenting the place where it was, and that this fact was known to the person who put it there, the principle being that the knowledge of the defendant that the children were in the habit of trespassing is a matter of inducement only, and that they, by the defendant's acquiescence, from being trespassers become licensees.

The jury had found that the defendants were negligent and that the boy had exercised reasonable care according to his age. The Appellate Division denied recovery on the ground that the boy was a trespasser—there was, in the words of Riddell, J., no "implied invitation."

In *Brignull* v. *Village of Grimsby*,[32] the defendants left a road grader in a defective and dangerous condition on a highway and a child five and one half years of age was injured while playing on the machine. The Ontario Appellate Division held the defendants liable, on the ground that there was allurement and absence of trespass, thus

[31] (1923), 55 O.L.R. 82.
[32] [1925] 2 D.L.R. 1096.

distinguishing the case from *Wallace* v. *Pettit* (*supra*), *Mangan* v. *Atherton*[32a] and *Hughes* v. *Macfie*.[32b]

Jannack v. *Warren*[33] makes a distinction similar to that made by Mr. Justice Holmes in the case of *United Zinc Co.* v. *Britt*[34]—namely, the distinction between a thing on premises which in itself attracts a child to the premises and a thing which does not so attract but which the child interferes with after he gets on the premises. In the *Jannack* case (*supra*) a number of boys had started a fire outdoors. Plaintiff, a boy of seven, went to a gasoline tank on premises occupied by the defendant, took some gasoline to help the fire, and was burned. It was held that the plaintiff went on the defendant's premises, not because allured there,[35] but because he wanted gasoline, and also that the plaintiff was old enough to understand the danger.

In *Richardson* v. *C. N. Ry.*,[36] it was held that leaving a heap of repairing stone in a public place is not alluring a child.

Of the above cases, it will be noted that outside of *Sangster* v. *Eaton* (*supra*) where the plaintiff was an invitee or business visitor, no Ontario court has allowed a child intruder to recover unless the injury was suffered on a highway or so near a highway that the condition of the premises could be said to amount to a nuisance. For injuries received by child intruders on private premises, the element of nuisance being absent, the Ontario doctrine seems to require the following conditions before there can be recovery:

(1) The thing which caused the injury must be an allurement[37] and dangerous.

(2) Children must be in the habit of frequenting the place[38] where such allurement is.

[32a] (1866), L.R. 1 Ex. 239.
[32b] (1863), 2 H. & C. 744.
[33] (1926), 29 O.W.N. 434.
[34] 258 U.S. 268.
[35] See also *Plawiuk* v. *Advance Rumely Thresher Co.* (1922), 70 D.L.R. 533, (Alta.).
[36] [1927] 2 D.L.R. 801.
[37] The recent weight of authority in Ontario would seem to indicate that there need be no intent to allure with the purpose of causing injury. At least, the element of malice has not been stressed in the later cases. In *Hardy* v. *Central London Ry.* (1921), 124 L.T.R. 136, Bankes, L.J., seems to regard malicious intent to injure as essential to the right of action. He cites *Latham* v. *Johnson* and *G.T. Ry.* v. *Barnett* as authority. The latter case does not seem to contain any such proposition.
[38] Probably if the child is not a trespasser as to the place, the fact that he may be injured while unlawfully meddling with something in such place will not prevent recovery: *Ricketts* v. *Markdale* (*supra*); *Brigmull* v. *Grimsby* (*supra*), and see *Glasgow* v. *Taylor*, [1921] A.C. 44; Salmond on Torts, 7th ed., 475. See also *Mayer* v. *Prince Albert*, [1926] 4 D.L.R. 1072, (Sask.) allowing recovery for the death of a boy of nine from shock and a fall received while climbing a defective electric light pole of defendant city. The decision turns on the ground that the pole and wires amounted to a nuisance.

(3) Such frequenting must come to the knowledge of defendants.

Some other courts in Canada look more favourably on child intruders. Thus, the Supreme Court of Nova Scotia in the case of *Burbidge* v. *Starr Mfg. Co.*,[39] allowed recovery where the defendants had on their premises an unenclosed driving shaft under which children were accustomed to pass on their way to a nearby river, and which one day caught an eight year old boy and caused his death. Employees of the defendants were constantly driving children away from the premises. The trial Judge, Ritchie, E.J. said:

> Having regard to the remarks of Lord Macnaghten in *Cooke* v. *Midland Ry.* (*supra*), I put to myself the following question: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the defendant company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place to play, and passing to and fro under the shaft . . . and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred? Without any doubt or hesitation I answer this question in the affirmative.

On appeal, the judgment of the trial judge was affirmed, Longley, J. dissenting. In the appellate court the Company's liability was placed on the ground that the Company should either have taken effective measures to exclude children, which they had not done, or else enclose the shaft, which was attractive and dangerous to young children. Russell, J. noted that the shaft could be enclosed at little cost to the defendants.

The same Court, in *McNeil* v. *Acadia Coal Co.*,[40] allowed recovery under the following circumstances: Two children, seven and nine years old, who lived with their father, an employee of defendants, in a house in the defendants' railway yard, were killed by a shunting train operated by the defendants' servants. The jury found that the accident was caused by the defendants' negligence and that the children were on the track by permission of the defendants. Judgment was given at the trial for plaintiffs, and appeals to the Supreme Court of Nova Scotia *en banc* and later to the Supreme Court of Canada failed.

In the Supreme Court of Nova Scotia, Mellish, J., for the Court said that they could not say:

> That the jury was not justified in finding that the children had an implied license to use the track . . . each case must be considered in

[39] (1921), 54 N.S.R. 121; 56 D.L.R. 658.
[40] [1927] 1 D.L.R. 601.

relation to its own circumstances. A railway company . . . . may so use its premises by not fencing them or otherwise as to practically invite children to use them. If so, the fact that the children might possibly be punished for a violation of a statute,[41] . . . would not . . . entitle the company to act toward them as if they were trespassers.

The Supreme Court of Canada[42] affirmed the decision of the Nova Scotia Court and invoked in favour of the children a principle that may have far-reaching effect in similar cases:

> Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong . . . the case cannot be treated upon the footing that they were bound by the Statute, or that the principle that knowledge of the law is presumed can be invoked against them.[43]

A case which may be said to go to great lengths in favour of children is *Stinson* v. *Canadian, etc. Co.*[44] There, the defendants had a gas well in an unfenced field adjoining a public road. The door of the house covering the well was not securely fastened and the planks in the floor were loose. Two boys, aged thirteen and ten, went into the house looking for calves—calves having previously strayed into the house. On going inside the boys saw two planks out of the floor and thinking that perhaps the calves had fallen into the well, one of them lighted a match to see into the well, and an explosion occurred. The trial judge held that the boys' visit "was on business, to recover property, and the interest of the defendants in that business was material in that these calves should be removed from their building." He therefore followed the doctrine of Willes, J. in *Indermaur* v. *Dames* (*supra*) and held the defendants liable. An appeal to the Supreme Court of Alberta was dismissed.[45] It seems difficult to rest this case on the *Indermaur* v. *Dames* ground. It may be said to represent another example of a court's endeavouring to work out what is probably a correct result by the use of the old categories of liability. The second ground mentioned by the trial judge is that taken by Lord Macnaghten in the *Cooke* case (*supra*)—namely, that the defendants should have anticipated an

[41] The Nova Scotia Railway Act.
[42] [1927] S.C.R. 497 at p. 504.
[43] But see *Moore* v. *Moore*, 4 O.L.R. 167: "A hard and fast line has been drawn by criminal law at the age of fourteen as the limit of incompetence to commit crime, but this rule is inapplicable to civil proceedings and the age, capacity and experience of the child must be taken into consideration by the jury in ascertaining what measure of reasonable care must be exacted from him": Armour, C.J. And see Beven, Negligence, 4th ed., 196, 224.
[44] [1925] 3 D.L.R. 34.
[45] [1925] 4 D.L.R. 529.

accident and taken the precaution of locking the door. This seems to be firmer ground.

Some of the English and Irish cases dealing with child intruders must be noted, and the case that probably has aroused the most discussion is *Cooke* v. *Midland Great Western Railway* (*supra*). In that case the defendant had a turntable, unlocked, unfenced and unfastened, close to a public road. Trespassing on the premises was forbidden but nevertheless the turntable was habitually resorted to by children who came on the premises through a gap in the fence. The plaintiff, five years old, was placed on the turntable by other older boys who then revolved it, and the plaintiff was seriously injured. The question for the House of Lords was whether there was any evidence of negligence by defendants fit to be submitted to the jury. To this question the four Lords all answered, yes, though not on a uniform ground. Lord Macnaghten thought the proper question for the jury was whether an ordinary individual would have foreseen danger to children under the circumstances and have either prevented their intrusion altogether or taken precautions to prevent accidents.[46] It seemed to him that there was evidence that the Company was guilty of negligence. The above must be taken as the real ground of Lord Macnaghten's speech and while later on he refers to a "tacit permission," his remark seems to be merely dictum. Lord Loreburn agreed with Lord Macnaghten. Lord Atkinson said that the children entered the premises and played on the turntable with leave and license of the defendant. He felt that the question whether liability to children trespassers was the same in extent as liability to child licensees might have to be determined on some future occasion. Lord Collins thought that there was evidence of "not merely a license but an invitation." Only one of the Lords deals with the question of how leave and license should be proved. Lord Atkinson says that "the previous history and actual physical condition of the premises were elements proper for consideration on this point,—the existence and condition of the gap in the hedge amongst others."

The tendency since 1909 seems to be to restrict the scope of the *Cooke* case[47] and to regard it as a case of license.[48] In *Jenkins* v. *Great Western Ry.*,[49] it was held that the plaintiff, a child of two and one half, had a license to go on a pile of sleepers on the

[46] Lord Macnaghten's view, it will be noted, corresponds with that of Brett, M.R., expressed in *Heaven* v. *Pender* (1883), 11 Q.B.D. 503.

[47] Mr. Beven thought that in the *Cooke* case (*supra*) the plaintiff should have been nonsuited, Beven's Negligence, 4th Ed., 203.

[48] See *Addie* v. *Dumbreck*, [1929] A.C. 358.

[49] [1912] 1 K.B. 525.

Company's premises, but no license to go a few yards farther to the company's railway tracks. The Court said that there must be knowledge that children were using the particular place and there was no such knowledge here. The *Cooke* case (*supra*) is treated by the Court as a case of license or invitation.

Latham v. *Johnson* (*supra*) again distinguished the *Cooke* case (*supra*). In *Latham* v. *Johnson* (*supra*) a child, between two and three years, was injured on a heap of paving stones on defendant's premises. The public were allowed to traverse, and children to play on the premises. The Court of Appeal denied recovery. Farwell, L.J. said: "There is neither allurement nor trap, invitation nor dangerous thing." Hamilton, L.J. thought that "there was no evidence that the heap of stones was a trap. It was no more than was to be looked for naturally on such an open plot . . ." The *Cooke* case (*supra*) was declared by both Lord Justices not to have laid down any new law. Farwell, L.J., was "not aware of any case that imposes any greater liability on the owner toward children than towards adults," and Hamilton, L.J. said that "a child will be a trespasser still, if he goes on private ground without leave or right."

Hardy v. *Central London Ry. Co.*,[50] also placed the *Cooke* case (*supra*) on the ground of license, and held that the plaintiff Hardy, a boy of five, who had been injured while playing on defendants' escalator, was a trespasser and could not recover. Some of the statements in this case must be taken to mark the extreme limit of the immunity of possessors of premises. Thus Bankes, L.J.: "If the plaintiff was a trespasser then he has no right of action, as there is no evidence of any allurement with malicious intent to injure." Warrington, L.J. quotes and approves Hamilton, L.J.'s statement in *Latham* v. *Johnson* (*supra*), of the duty owed to a trespasser. Scrutton, L.J. said:

> If the children were trespassers, the landowner was not entitled intentionally to injure them or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business.

This is precisely the duty to adult trespassers as laid down in many English cases. Scrutton, L.J. would seem to put child intruders and adult trespassers in the same class, without even the concession that a thing may be a trap for a child which would be safe for an adult.

[50] (1921), 124 L.T.R. 136, approved in *Addie* v. *Dumbreck*, [1929] A.C. 358.

In the Irish case of *Coffee* v. *McEvoy*,[51] Cherry, J. also put children and adults in the same group. He said:

> If the child is . . . a trespasser . . . I do not think that the owners of the premises can be held liable for damage done to him by mere negligence. . . . There must be some act done with the deliberate intention of doing harm to the trespasser.

The Lord Chancellor of Ireland however stated that the law as to trespassers could not be regarded as settled and Holmes, L.J. would not hold that, if damage to a trespasser were caused by a wilful or reckless act, a child and an adult would be in the same position.

Glasgow v. *Taylor*,[52] was a case where the child was in the City Gardens or park as of right, and the presence of poisonous but attractive berries on a shrub in the gardens, without definite warning of the danger and definite protection against the danger being incurred, was held to be negligence entitling the pursuer to recover.

The Scottish Court of Sessions in *Glasgow* v. *Taylor* (*supra*) had imposed liability on the City, on the ground that the parents of the child were entitled to regard the gardens as a place reasonably suitable and safe for children,[53] which in fact they were not. But where children intrude on premises without the permission of the possessor, Scottish Courts seem disinclined to allow recovery unless the source of danger is concealed or not discernible by children. Thus, in *Ross* v. *Keith*,[54] two children were drowned in a disused clay pit, twenty-five yards from a public road. The premises were fenced but a gate giving entrance thereto could be easily opened. Children frequented the place but were constantly being driven off by defendants. The Scottish Court of Sessions held the landowner not liable. In *Cummings* v. *Darngavil Coal Co.*,[55] a boy of eight was injured by a machine which the Company had on unfenced ground adjoining a highway. There was said to be no duty to fence property so as to prevent trespassers from being injured by machinery legitimately being used on property.

The cases of *Hastie* v. *Edinburgh Magistrates*[56] and *Stevenson* v. *Glasgow Corporation*,[57] referred to in *Glasgow* v. *Taylor* (*supra*), were cases of drowning of children in an artificial pond and a river respectively, both pond and river being in public parks, but both

[51] [1912] 2 I.R. 290 at p. 309.
[52] (1921), 38 T.L.R. 102.
[53] See also *McStravick* v. *Ottawa*, [1929] 3 D.L.R. 317.
[54] (1888), 16 C.S.C. 86, 4th Series.
[55] [1903] S.C. 513.
[56] [1907] S.C. 1102.
[57] [1908] S.C. 1034.

being regarded as obvious dangers. Recovery was denied in both cases. Recovery was also denied in *Holland* v. *Lanarkshire Committee*,[58] where a child six years old fell into a disused quarry on private ground, to which he had obtained access from a strip of ground belonging to third parties and used by children as a playground. The playground and the quarry ground were separated by a fence but part of the fence had broken down. The Lord President said:

> There is, generally speaking, no duty to fence dangerous places on private property, but a duty to do so may be cast upon a person in consequence of his own acts. . . . The duty may arise through the owner inviting people to come on his property. Thus, for instance—taking your property as you find it—there may be upon it an excavation which might be a source of danger, yet the mere existence of which casts no duty upon you to fence it. But that duty may arise if, by your invitation, people are invited to go near that dangerous place. Again—taking your property as you find it—it may be subject to some public right, as, for instance, if it is traversed by a public road, and then if you create a danger in immediate proximity to that public road there may be a duty on you to fence it. But it is a new and unheard of proposition that, if you have something on your ground as to which there is no duty of fencing, and someone else makes use of his ground in some particular way, a duty is thereby imposed upon you of doing what you were under no duty to do before, a duty, namely, of fencing. I know of no authority for such a proposition. The quarry here was old and disused long before this strip of ground had become open to the use of the children, and that, I think, ends the question. The distinction is very obvious between such a case and the case of a person bringing a dangerous machine of an alluring character upon his ground, or of creating a danger where none existed before.

In *McKenna* v. *Coatbridge Magistrates*[59] a boy of ten was injured in a public park by a low iron fence with blunt spikes on top. Recovery was denied, the spikes not being considered either a concealed danger, or an "allurement or attraction" to children.

On the other hand, if it is known that children are allowed and accustomed to play in a place, the dangers of which will not be apparent to them—If the condition is such as to amount to a "trap"—the Scottish Courts allow recovery, or at least allow the case to go to the jury. In *Boyd* v. *Glasgow Iron and Steel Co.*,[60] children had been in the habit of playing about a ruinous engine house. A boy of ten climbed up on the wall and sat on a stone which looked safe to sit on, but which really was not safe. The stone became dislodged and the boy fell to the ground and was injured. The Court of Sessions treated the boy as a licensee and the condition of

[58] [1909] S.C. 1143 at 1149.
[59] [1924] S.C. 356.
[60] [1923] S.C. 758.

the engine house as a "trap" or concealed danger. The only evidence of license in this case was the custom of children to play, which custom was known to defendants. Lord Anderson said that it was defendants' duty either to pull down the building or to fence it. If this building had been fenced he thought that the defendants would have had a complete answer, because fencing would negative the plea of tolerance, and children climbing the fence would be trespassers.

The case of *McKinlay* v. *Darngavil Coal Co.*,[61] is very similar. Children were permitted to play around a heavy gate 12 feet long and 9 feet high, which had been allowed to get into disrepair and could not be fastened. A child's head was crushed between the gate and the gate post. The House of Lords held that the case was a proper one to go to a jury.

The Scottish cases would seem to agree with the English cases in making no distinction, in kind, between adult and children trespassers. But knowledge of habitual trespasses by children, with no attempt to stop the practice, is sufficient ground to infer a license to the children.

The text-writers on the English law as to the position of child intruders are a unit in declaring that the duty to children and adults is the same in kind, though different in degree. Thus Beven:

> There is no special obligation of duty in the case of a young child, as contrasted with degrees of care.[62] . . . By English law there is no legal duty imposed on a landowner carrying on business on his land to do anything to lessen dangers which may attach to trespassers on it, quite irrespective of whether they are adults or children unless he uses his land to be a nuisance to people using the highway, or uses his land with the intent to allure. Every landowner has free liberty to employ his land as he likes, so only safeguarding that by his acts he does not infringe upon the rights of others in the enjoyment of their rights.[63] . . . To make an allurement there must be an intention to attract or to injure, otherwise the liberty to act or not to act is unfettered.[64]

Sir Frederick Pollock:[65]

> On principle it is hard to see why he (a bare licensee) should be entitled to more care because he was a child or an idiot, if his condition was not known to the occupier and he was not specially invited.

[61] [1923] S.C. 34 (H.L.).
[62] Negligence, 4th ed., 198.
[63] Ib.
[64] *Ib.*, 217.
[65] Torts, 12th ed., 532.

Sir John Salmond:[66]

> Is an occupier of dangerous premises bound to take precautions against children trespassing thereon and coming to harm? . . . In England it may be said with some confidence that no such rule of liability is recognized. . . . Where however an occupier habitually and knowingly acquiesces in the trespasses of children, these children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly.

Sir John Salmond later observes that the principle applicable to adult licensees, namely: that the only duty of the occupier is to warn of concealed dangers, is also applicable to children, with the modification that the duty to a child is more extensive than that towards an adult, because a child lacks an adult's capacity to perceive danger and to profit by warnings.

Charlesworth:[67]

> It may be premised that the principles above laid down (as to trespassers) apply as well to children as to adults. . . . When a child is a trespasser it has no more rights than an adult.

Findlay:[68]

> What in fact is the legal right, if any, of a child who is trespassing for injury sustained in case of accident? A short answer to that question is contained in the judgment of Farwell, J., in the case of *Latham* v. *Johnson* (*supra*). "I am not aware," he said, "of any case that imposes any greater liability on the owner towards children than towards adults; the exceptions apply to all alike and the adult is as much entitled to protection as the child."

The American cases are divided on the question. In the celebrated case of *Sioux City and Pacific Ry. Co.* v. *Stout*,[69] decided by the Supreme Court of the United States over fifty years ago, the question was as to the liability to a child intruder, six years old, who had been injured by a turntable maintained in an unsafe condition by the Company. Despite the fact that children had been forbidden to play on the turntable it was held that the trial judge's charge—that the defendant would be guilty of negligence if, knowing or having reason to believe that children would resort to the turntable to play, and so resorting be liable to injury, it nevertheless took no means to keep children away or to prevent accident—was sound. It is to be noted that the case says nothing about allurement or license (as some of the judgments in the *Cooke* case

[66] Torts, 7th ed., 471, 472.
[67] Liability for Dangerous Things, pp. 273, 278.
[68] Property Owners' and Occupiers' Liability, 88.
[69] (1873) 17 Wall. 657.

did) but proceeds entirely on the ground that special regard must be had for children.

The recent cases of *United Zinc & Chemical Co.* v. *Britt* (*supra*) and *New York etc. Ry.* v. *Fruchter*,[70] though probably distinguishable from the *Stout* case on their facts, have undoubtedly weakened the effect of that case.[71] The weight of authority, however, in American Courts would still seem to be in line with the *Stout* case (*supra*). Certainly there is much more American than English or Canadian authority for the proposition that possessors of premises must have some regard to the presence of children—even though the children be regarded as trespassers. Very often British courts reach the same result as some American courts by holding that children acquire a license. But if a man constantly warns children to stay away from the premises, it is difficult to see how it can be said that he licenses children to use such premises, and to speak of such children as licensees seems a palpable fiction. The possible methods of dealing with children intruders would seem to be: Maintain what is often a fiction of license, *or* treat children trespassers as adult trespassers, *or* put children trespassers in a separate class, *or* adopt some general standard such as that of Brett, M.R.,[72] or that laid down by Lord Macnaghten in the *Cooke* case (*supra*).

It will be said that the application of such a standard will work undue hardship on possessors of premises. So Lord Hunter (dissenting) in the Scottish case of *Boyd* v. *Glasgow Iron and Steel Co.* said:

> I think that to hold that the owner of a building in decay is bound either to level it to the ground, or to take positive measures to see that boys can only indulge their natural proclivities for mischief in perfect safety to themselves, is to place a burden upon the owners of property which, so far as I know, has never yet been done in any decided case.

It will be noted, however, that Brett, M.R., spoke of "ordinary care and skill to avoid such danger," and Lord Macnaghten of "ordinary precautions to prevent such an accident." It is not required that all dangerous machinery be demolished, or that the possessor be put in the position of an insurer of the safety of children. The possessor must use due care under the circumstances and among the circumstances which would seem proper to be considered are the nature of the use to which the land is put, the expense of guarding it by fence or otherwise, the frequency of visits by chil-

[70] (1922), 43 Sup. Ct. Rep. 38.
[71] See Hudson, 36 Harv. L. Rev. 836; Harvard, Essays, 407, 424.
[72] In *Heaven* v. *Pender* (1883), 11 Q.B.D. 503.

dren, the number and age of the children who come on the premises, the seriousness of the possible injury, the obviousness of the danger. In *Hardy* v. *Central London Railway Co.*,[73] Scrutton, L.J. said:

> Many of them (landowners) have objects attractive to children on their land: apple trees, streams and other infantile joys. Must they, besides warning off the children whenever they see them, erect such fences or walls that no child can get through?

Failure to erect such fences or walls does not seem to be an indication of lack of reasonable care on the part of a possessor of land. It would be an expensive process to build a fence which would adequately restrain boys who wished to enter, and a possessor is not required to incur undue expense in order to be reasonable.[74]

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[73] (1921), 124 L.T. at p. 140.

[74] Farwell, L.J., in *Latham* v. *Johnson* (*supra*) seems to suggest that a distinction is to be drawn between natural and artificial uses of land. Middleton, J., seems to have a similar idea in *Pedlar* v. *Toronto Power Co.* (*supra*).