DUTIES OF OCCUPIERS AND OWNERS OF DANGEROUS PREMISES.

I. Duty of Occupier to Invitees.

Rule in *Indermaur* v. *Dames*.—The duty which an occupier of premises owes to persons who enter on the premises by the express invitation of the occupier, or upon business of mutual concern, was definitely formulated in the leading case of *Indermaur* v. *Dames*.[1] The plaintiff in that case was a gas-fitter who went upon the defendant's premises to test a gas regulator which had been supplied by his employer. While so engaged he fell through a trap-door and was injured. The trap-door was used for raising and lowering sugar from one floor to another. It was unfenced at the time of the accident, and was open and not then in use. The Court decided that the plaintiff was on the premises on business in which the defendant was interested, and was there by invitation of the defendant upon business in which the defendant was concerned, and the defendant was, therefore, held liable in having neglected his duty to take reasonable care by fencing the shaft or warning the plaintiff.

The following extracts from the judgment delivered by Willes, J., state clearly the law applicable: "We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation expressed or implied. The common case is that of a customer in his shop; but it is obvious that this is only one of a class—for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger which the occupier knows, or ought to know. . . . This protection does not depend upon the fact of a contract being entered into in the way of a shopkeeper's business, but upon the fact that the customer has come into the shop pursuant to the invitation given by the shopkeeper with a view to business which concerns himself. The class to which the customer belongs includes persons who go, not as mere volunteers, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier upon his invitation expressed or implied. . . . And with respect to such a visitor

[1] (1886), L. R. 1 C. P. 274; 2 C. P. 311.

at least we consider it settled law, that he, using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know, and that where there is evidence of neglect the question whether such reasonable care has been taken by lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact."

Unusual Danger.—The duty thus resting upon the occupier with respect to those who resort to his premises upon his invitation, express or implied, from the fact that they come on business in which he is interested is to use reasonable care to prevent damage from *unusual danger* which he knows, or ought to know. The duty extends not to all latent dangers existing on the premises, but merely to those which are more or less concealed or unusual, and which the invitee would not expect to find on the premises. As it is often expressed, the duty is not to make the premises safe, but only to prevent injuries from "traps" or concealed dangers existing on the premises.[2] "A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger . . . trap is a relative term."[3] The term "unusual danger" has been interpreted as meaning danger unusual to the place and the person injured.[4]

Dangers Obvious or Known.—As to obvious dangers the invitee must protect himself. The duty of the occupier is confined to protecting the invitee by warnings and precautions relating to the existence of any concealed dangers to which he is exposed by reason of the state of the premises. It follows that if the danger is patent to all who come on the premises, or if the invitee is familiar with the premises and has knowledge of the danger he cannot recover against the occupier, for in such case the danger is not "unusual." In *Cavalier* v. *Pope*,[5] it was said that "one of the essential facts necessary to bring a case within the principle (of *Indermaur* v. *Dames*), is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered." "In such a case the true maxim seems to be *scienti non fit injuria*,"[6] and so a

[2] *e.g.*, *Durant* v. *Ontario & Minnesota Power Co.* (1917), 41 Ont. L. R. 130.

[3] *Latham* v. *Johnson*, [1913] 1 K. B. at 415.

[4] See discussion by Phillimore, J., in *Norman* v. *Great Western Ry.*, [1915] 1 K. B. at p. 596.

[5] 1906, [A. C.] at p. 432. See also *Despointes* v. *Almond* (1913), 18 B. C. R. 578, where the injury was caused by a man falling in an elevator shaft. The action failed because the injured person had knowledge of the existence of the danger.

[6] *Per* Atkins, J., in *Lucy* v. *Bawden*, [1914] 2 K. B. 318.

landlord has been held not liable for an injury sustained by a child of his tenant falling through the railing on the front door-steps. The fact that one of the upright bars was lacking from the railing was obvious and there was therefore no "trap."[7] Similarly a railway company has been held not liable where it allowed an entrance to its station to become dangerous to its passengers because of an accumulation of snow and ice, the dangerous condition of the steps being obvious to all.[8]

It is not, however, essential that the danger be patent to the world; the occupier will escape if it was in fact known to the person injured. A tenant who is aware of a defect in a stairway and is later injured on it cannot complain; because "if there was no concealment, or the danger was in fact known to the invitee, there was no trap as far as concerned that particular invitee."[9] This point is well illustrated by cases where persons enter or walk about on premises in the dark;[10] for, as has been said, "if a staircase is dark, a person using it must obviously be aware that it is in such condition; whereas, in the case of a person using a staircase which is out of repair . . . it may not be obvious to him that it is so."[11]

Warning.—The duty of the occupier of premises to persons coming thereon by invitation is not necessarily to make the place reasonably safe; he has the alternative course open to him of giving proper notice of the unusual danger; and if he does, he cannot be held guilty of negligence with regard to safeguarding his visitor from danger. In the absence of special information of a specific danger, an invitee is entitled to regard the usual tacit business invitation as one to visit the premises in the condition in which premises of that nature usually are if reasonably kept as such, at the time he visits them.[12]

Constructive Knowledge of Dangers by Invitor.—An invitee "would be entitled to recover if he satisfied the jury that his injury was the result of being exposed to a concealed danger of which defendant knew, or ought to have been aware, and of which he himself had no knowledge or notice."[13] That is, the invitor must use reasonable care to prevent damage from unusual dangers of which

[7] *Dobson* v. *Horsley*, [1915] 1 K. B. 624; *Lucy* v. *Bawden*, *supra*; *Norman* v. *Great Western Railway Company*, [1915] 1 K. B. 584.
[8] *Brackley* v. *Midland Railway Co.*, [1916] 114 L. T. 1150 (C.A.); 85 L. J. K. B. 1596.
[9] *Groves* v. *Western Mansions Ltd.* (1916), 33 T. L. R. 76 at p. 77; *Keech* v. *Sandwich* (1915), 22 D. L. R. 784; *Pittzen* v. *Shokluk* (1922), 60 D. L. R. 313.
[10] *Lewis* v. *Ronald* (1909), 26 T. L. R. 30; *Huggett* v. *Miers*, [1908] 2 K. B. 278; *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633.
[11] *Huggett* v. *Miers*, *supra*, *per* Fletcher Moulton, L.J.
[12] *The South Australian Company* v. *Richardson*, 20 C. L. R. (Austr.) 181, 9 Brit. R. C. 52; *Pittzen* v. *Shokluk* (1922), 60 D. L. R. 313.
[13] *Elliott* v. *Roberts*, [1916] 2 K. B. at 527; *Cf. Norman* v. *Great Western Ry. Co.*, [1915] 1 K. B. 584.

he actually knows or ought to know. The effect of the decisions is to fix the occupier with constructive knowledge of all unusual dangers, the existence of which would be revealed by the exercise of reasonable care and skill. "The expression 'ought to have been aware' must be explained, and after explanation it seems to me to mean would have known but for the failure to exercise reasonable care and skill, i.e., but for negligence."[14] Thus, the occupier will be liable for injury caused by a defect easily discoverable upon examination;[15] but not where the defect is a latent one.[16]

Independent Contractors.—An occupier does not discharge his duty to invitees by the mere employment of independent contractors and it is no defence to him that the injury was caused by hidden dangers resulting from work or appliances being done or used or structures erected on the premises under the control of independent contractors.[17] It may be noted also that independent contractors or other persons who are not occupiers who create a hidden danger on the premises of another are liable under the rule in *Indermaur* v. *Dames*.[18]

Who are Invitees.—The duty in *Indermaur* v. *Dames* applies to all persons who come on the premises upon the invitation, express or implied, of the occupier. This implied invitation is inferred from the fact that a person comes upon the premises upon any business which concerns the occupier, or in which he has any interest whether direct or indirect. Customers who come to the occupier's store,[19] or teamsters who come to deliver parcels,[20] or persons who come to collect money from the occupier[21] are clearly invitees, inasmuch as the occupier is directly concerned in their presence. But it is sufficient that a person is on the premises in the ordinary course of business, or upon business in which the occupier has any interest however indirect, and it is immaterial that the occupier gets no apparent benefit from his coming. Thus a dock company has been held liable for injuries sustained on a dock by persons seeking to get on board a ship moored there,—the dock company receiving payment from the owner of the ship to provide access to it.[22] A railway or steamship company owes this duty not only

[14] *Cole* v. *De Trafford*, [1918] 2 K. B. 523 at 528.
[15] *Marney* v. *Scott*, [1899] 1 Q. B. 986; *Smith* v. *Steele* (1875), L. R. 10 Q. B. 125; *Wright* v. *Lefever* (1903), 51 W. R. 149 (C.A.).
[16] *Readhead* v. *Midland Ry.* (1869), L. R. 4 Q. B. 379.
[17] *Marney* v. *Scott*, [1899] 1 Q. B. 986; *Valiquette* v. *Fraser* (1907), 39 S. C. R. 1; *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501; *Stewart* v. *Cobalt* (1909), 19 Ont. L. R. 667; *Welsh* v. *Canterbury Paragon Ltd.* (1894), 10 T. L. R. 478; *Cox* v. *Coulson*, [1910] 2 K. B. 177; *Kimber* v. *Gas Light Co.*, [1918] 1 K. B. 439 (liability of independent contractor).
[18] *Corby* v. *Hill* (1858), 4 C. B. N. S. 556; *Kimber* v. *Gas Light Co.*, [1918] 1 K. B. 439; *Dom. Gas Co.* v. *Collins*, [1909] A. C. 640.
[19] *Mitchell* v. *Johnstone Walker Ltd.* (1919), 47 D. L. R. 293.
[20] *Brebner* v. *The King* (1913), 14 Can. Ex. R. 242; *Despointes* v. *Almond* (1913), 18 B. C. R. 578.
[21] *Pritchard* v. *Peto*, [1917] 2 K. B. 173.
[22] *Smith* v. *London Docks Co.* (1868), L. R. 3 C. P. 326.

to the passengers who come to a station or pier to embark, but also to those who come there to assist or greet passengers.[23] This duty is incident to the possession of any premises, structure, vehicle or thing which persons are invited to use for themselves or for the storage or carriage of their goods or animals[24] and to dangers which arise not merely out of the condition of the land or buildings but also to those which arise from the use of all chattels, machinery, or appliances thereon,[25] even though they are not in the immediate control of the occupier. The invitation protects the invitee from all hidden dangers arising from the use of the premises in the natural way. In *Heaven* v. *Pender*[26] the plaintiff was employed by the owner of a ship at a dock to paint the ship and was injured by the collapse of a staging supplied by the dock owners. The dock owners were held liable, although the staging was not in their control, on the principle that persons working on the ship "must be considered as invited by the dock owner to use the dock and all appliances provided by the dockowners as incident to the use of the dock." So, where a lavatory was supplied by a barber for the use of his customers and he allowed one seeking to use it to enter a stairway which was unlighted and such as to constitute a concealed danger or trap he was not permitted to shield himself by proving that the stairway and lavatory were in fact on different premises and not under his control. The invitation to use the shop included an invitation to use the lavatory which was, so far as the plaintiff knew, part of the premises.[27]

Extent of Invitation.—The protection given to an invitee by the rule in *Indermaur* v. *Dames* only extends to him while he is on that part of the premises to which he is invited, or to which it is in the interest of the invitor that he should go, and does not apply where he goes on another part not included in the invitation. "The liability of the occupier is only commensurate with the extent of the invitation."[28] Thus in *Walker* v. *Midland Ry. Co.*,[29] a guest at a hotel got up in the night to go to the toilet-room, but entered another room by mistake in the dark and fell down a lift. It was held that while he was rightfully on the premises, the duty of taking care of him was "limited to those places into which guests may reasonably be supposed to be likely to go,

[23] *York* v. *Canada Atlantic S.S. Co.* (1893), 22 Can. S. C. R. 167; *Holmes* v. *North Eastern Ry.*, L. R. 4 Ex. 254; L. R. 6 Ex. 123; *Wright* v. *London Ry.* (1876), 1 Q. B. D. 252; *Watkins* v. *Great West Ry.* (1877), 37 L. T. N. S. 193; *Brackley* v. *Midland Ry. Co.*, *supra.*

[24] *Moffat* v. *Bateman* (1869), L. R. 3 P. C. 115; *Elliott* v. *Hall* (1885), 15 Q. B. D. 315; *Marney* v. *Scott*, [1899] 1 Q. B. 986; *Gunn* v. *C. P. R.* (1912), 1 D. L. R. 232; *Durant* v. *Ontario and Minnesota Power Co.* (1917), 41 O. L. R. 130; Pollock on Torts, 335.

[25] *Valiquette* v. *Fraser* (1907), 39 S. C. R..

[26] (1883), 11 Q. B. D. 503.

[27] *McCallum* v. *Hemphill* (1920), 50 D. L. R. 311.

[28] 21 Halsbury, 390.

[29] 2 T. L. R. 450; *Mason* v. *Langford* (1888), 4 T. L. R. 407.

in the belief, reasonably entertained, that they are invited or entitled to do so." On the same principle in an Ontario case[30] it was held that the owner of a railway and traffic bridge, one part of which was used for railway traffic only, and was not floored,—(the other part being fenced off from the railway portion and used for passage of persons and vehicles, a small charge being made for such use) was not liable for the death of an intoxicated person, who in order to escape payment of the charge attempted to cross on the railway portion of the bridge, and fell through the bridge. The implied invitation to him was merely to use the footpath and did not include the railway part. Similarly the invitation is confined to such use of the premises as is contemplated by the invitor; and so a landlord is not liable if a tenant falls through an unrailed opening of a fire-escape while drying clothes thereon.[31]

Dangerous Activities on Premises.—It would seem that the duty to an invitee is not confined to preventing damage from the physical condition of the land and structures but also extends to protection from all unusual dangers to which the invitee is exposed while on the premises and which are due to some work or activity on the premises. Thus a theatre owner has been held to be bound to use reasonable care to prevent a spectator from being exposed to any unusual danger arising out of the performance of a play, as, for example, danger from a shot fired by an actor on the stage.[32] It is no defence that the danger was not created by the defendant and was not actually existing on his premises but was caused by the dangerous condition of neighboring premises, of which condition, however, defendant was aware. In an Alberta case[33] a customer recovered for injuries sustained while in the defendant's shop on business from the collapse of an adjoining wall on a neighbor's land, where the defendant knew of the impending danger and failed to warn the customer, or to exclude the customer from that part of the store which was in the danger zone.[34]

II. Duty to Licensees.

Rule in Gautret v. *Edgerton.* To persons who come upon premises without the occupier's invitation, express or implied, but merely by the gratuitous permission of the occupier and upon business which does not

[30] *Walsh* v. *International Bridge Co.* (1919), 45 D. L. R. 701. See *Headford* v. *McClary*, 21 Ont. A. R. 164; affirmed in 24 S. C. R. 291, where a workman went out of his way to look at an elevator being repaired and was held not entitled to recover.

[31] *Thyken* v. *Excelsior Life Co.* (1917), 34 D. L. R. 533.

[32] *Cox* v. *Coulson*, [1916] 2 K. B. 177.

[33] *Mitchell* v. *Johnstone* (1919), 47 D. L. R. 293; [1919] 3 W. W. R. 24; *Cf. McCallum* v. *Hemphill* (1920), 50 D. L. R. 311.

[34] Generally as to invitees see: *Levine* v. *Dominion Express Company*, [1922] 1 W. W. R. 1143; *Smith* v. *Mason*, [1921] 2 W. W. R. 614; *Fonseca* v. *Lake Milling Company* (1905), 1 W. L. R. 553; "Duty of Invitors," 32 L. Q. R. 255.

concern him, he owes a lesser degree of care than to invitees. Such persons are called "bare" or "mere" licensees and the occupier owes them the duty not to expose them to any concealed danger of which he is aware, without warning them of the peril or trap.[35] He must not intentionally and wrongfully allow a person to enter premises on the faith of his permission when such premises are to the occupier's knowledge unsafe, and subject to some hidden risk. Such conduct would be practically a fraud on the licensee. The grantor of a license is in a position analogous to that of the donor of a gift, and the principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing unless he knew its unsafe character at the time, and omitted to caution the recipient. There must be something like fraud on the part of the donor before he can be made answerable. Accordingly it was held in the leading case of *Gautret* v. *Edgerton*[36] that the defendant was not liable for the death of a person who, while crossing defendant's land with his tacit permission, fell through a bridge which was on the defendant's land and out of repair. The injured person was a bare licensee, and the defendant had been guilty of no active negligence and had not set the trap.

Who are Licensees.—Salmond[37] defines a licensee as "a person who enters on the premises by permission of the occupier, granted gratuitously in a matter in which the occupier has himself no interest." He is, therefore, as remarked by Willes, J., in *Indermaur* v. *Dames,* one "whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him." The permission to the licensee may be express or it may be implied from conduct such as tacit acquiescence in the licensee's use of the premises or his habitual coming upon them to the knowledge of the occupier.[38] Thus, e.g., the occupier may expressly grant another person the right to cross the land; or he may have suffered him to do so, without objection, for a greater or lesser period, in which latter case the invader is not a trespasser but secures the status of a licensee. It is, of course, otherwise where the occupier has always objected to such user or intrusion.[39] Social guests,[40] and servants[41] are classed as licensees.

[35] *Gautret* v. *Edgerton* (1867), L. R. 2 C. B. 371; *Carlson* v. *C. P. R.* (1920), 51 D. L. R. 250 (Alta.); *Perdue* v. *C. P. R.*, 1 O. W. N. 665.

[36] *Supra.*

[37] Salmond on Torts, 5th Ed., p. 410.

[38] *Hounsell* v. *Smyth* (1860), 7 C. B. (N.S.) 731; *Lowery* v. *Walker,* [1910] 1 K. B. 173, [1911] A. C. 10; *Gilbert* v. *Southgate,* (1915) 24 D. L. R. 202, *per* McPhillips, J.A.; *Latham* v. *Johnson,* [1913] 1 K. B. at 440; *Halliday* v. *Hewitt,* 8 Brit. R. C. 573.

[39] *Hardy* v. *Central Ry.,* [1920] 3 K. B. 459 (where the fact that children were always driven away when found on the premises resulted in their being treated as trespassers).

[40] *Southcote* v. *Stanley* (1856), 1 H. & N. 274.

[41] *Priestly* v. *Fowler* (1837), 3 M. & W. 1; *King* v. *Northern Navigation Co.* (1912), D. L. R. 69; (a boy on railway premises with a view to employment

Extent of Duty.—There is no duty resting on the occupier to keep the premises reasonably safe, but only to warn of the existence of hidden dangers. As to all obvious or ordinary dangers which the licensee would anticipate on such premises, or of which he is actually aware, the licensee takes his chances.[42] The position of a licensee is thus summarized in the judgment of Scrutton, L.J., in *Haywood* v. *Drury Lane Theatre*.[43] "A bare licensee who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps,—a trap being a danger which a person who does not know the premises would not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them." The mere fact that a person is the owner of land on which there is a "trap" does not make him liable for damages to a bare licensee, suffered by reason of the trap, if the owner had no knowledge of the existence of the trap.[44]

A licensee having received permission to enter or cross or otherwise use another man's premises must accept the permission with all its concomitant conditions and dangers, and must take the premises as he finds them.[45] He cannot complain if he suffers injury on the premises when exercising the permission, unless the injury is caused by some hidden danger of which the occupier was aware when he granted the permission, and of the existence of which he gave no warning. In such an event the occupier has misled him by something like "fraud" in permitting him to enter the premises and expose himself to the danger of a "trap" without warning.[46]

Warning of Existing Traps.—The duty of the occupier is to warn the licensee of all traps which he knows exist on the premises at the time the permission is given, and he will not be liable for injury sustained by reason of the fact that the premises subsequently became dangerous through non-repair. "If I dedicate a way to the public which is full of holes, the public must take it as it is. If I dig a pit in it I may be liable for the consequences; but if I do nothing, I am not."[47] But the occupier is liable if he knowingly or actively or negli-

was considered a licensee in *Collier* v. *Michigan Ry.* (1900), 27 Ont. A. R. 630; and see *McGuire* v. *Bridger* (1910), 49 Can. S. C. R. 632.

[42] *Loiselle* v. *The King* (1921), 56 D. L. R. 397; *Latham* v. *Johnson*, [1913] 1 K. B. at 411; *King* v. *Northern Navigation, supra.*

[43] [1917] 2 K. B. at 913.

[44] *Martle* v. *Nor. Life Assurance Co.*, [1920] 3 W. W. R. 228.

[45] *Blackmore* v. *Toronto Street Railway* (1876), 38 U. C. R. 172, 216: *Hounsel* v. *Smyth* (1860), 7 C. B. (N.S.) 731.

[46] *Robinson* v. *Dodge* (1918), 39 D. L. R. 679 (Man.); *King* v. *Northern Navigation Company* (1912), 6 D. L. R. 69.

[47] *Gautret* v. *Edgerton* at p. 373; *Hounsell* v. *Smith* (1860), 7 C. B. (N.S.) 731.

gently creates a new "trap" or danger on the premises after the permission has been granted and is being exercised, and gives no warning.[48] "The grantee (i.e., the licensee) must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The defendant took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant is added to that risk and danger."[49] So, in the leading case of *Lowery* v. *Walker*[50] it was held that the defendant was liable where, without any warning, he put a savage horse in his field which he knew to be habitually used by the public as a short cut. The horse attacked the plaintiff whilst he was crossing the field, and it was held that the placing of the horse in the field without warning of his vicious nature was in effect the setting of a trap.[51]

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[48] *Thyken* v. *Excelsior Life Co.* (1917), 34 D. L. R. at p. 538.
[49] *Gallagher* v. *Humphrey* (1862), 6 L. T. (N.S.) at p. 685; *Corby* v. *Hill* (1858), 9 Q. B. D. 80.
[50] [1911], A. C. 10.
[51] *Cf. Robinson* v. *Dodge* (1918), 39 D. L. R. 679; *Halliday* v. *Hewitt*, 8 Brit. R. C. 573; *Breen* v. *City of Toronto* (1911), 18 O. W. R. 522.

(To be continued).