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

A recent New York decision raises the very interesting question as to the right of one entitled to enter another's land irrespective of the owner's consent to recover for injuries caused by a defect in the roads or other approaches obviously placed for the use of those having the right to visit the land. In Meiers vs. the Fred Koch Brewery[1] the New York Court of Appeals held by a bare majority of the justices sitting that a fireman, who fell into an unguarded coal hole on the driveway of the Brewery while answering an alarm of fire sent out by one of its employees, was entitled to recover. The court regarded it as unimportant that the alarm of fire had been sent out by an employee and even that the fireman was on his way to extinguish a fire upon the defendant's property. They placed its liability upon the broad ground that an owner of land owes to those, who have a right to come upon his land not depending upon his consent, some obligation to see that they may safely use such parts of his land as he has prepared as the approaches, obviously intended to be used as such by those entitled to enter his premises. While the court's opinion was in some particulars broader than the facts of the case may have required, yet it is carefully limited to a liability to persons rightfully using the approaches prepared by the owner for access to his property.

The opinion of Andrews, J., recognizes a duty on the part of the owner to consider the safety of all persons who have a right to enter his premises. The origin of the right, its dependence or independence of the owner's consent is regarded as defining the extent of the duty and not as determining its existence. The owner's consent, while the most usual basis of another's right to enter his premises, is not the only one. If the entry is by consent, the terms on

[1]127 N. E. 491 (April 27, 1920).

which it is given, whether expressed, implied in fact, or assumed because regarded as fair and proper, may increase or diminish the owner's obligation. The paucity of the owner's duty to those, to whom he, without expectation of benefit, gives the privilege of using his land for their own purposes, is due to the terms and conditions of the giving, which are rarely if ever expressed, but which common fairness requires to be assumed as understood by donor and donee alike, whether the gift is of a chattel or its use, personal services, or favors, such as a free ride in a motor car or the use of land. Here the law only adopts a universally popular conception that the recipient of a gift must take the risk of its quality or condition, which is expressed not only in legal decisions but in proverb and adage. It is fully stated in the old saying that one may not look a gift horse in the mouth as in Mr. Justice Willis' more sophisticated statement that "Any complaint by a licensee may be said to wear the colour of gratitude."[2]

Furthermore the opinion did not attempt to define the defendant's duty beyond holding that since the road was for use by night as well as by day, it was its duty to keep it so lighted that one using it by night might discover and avoid a coal hole inserted and maintained unguarded by the owner.[3] It is not intimated that there is any duty to take precautions to make the premises safe for the peculiar needs

[2]While the American courts have recognized it as fair to throw upon the donee the risk of ascertaining the actual condition of the gift before availing himself of it, they or at least the majority of them, have not recognized as have the English courts, the equal fairness of requiring the donor to at least warn the recipient of his favor of any defect known to him, and not likely to be discovered by the donee. While as a mere matter of common justice, it appears fair that the donee of a gift shall not be entitled to expect that the donor will go to any particular pains to make the gift safe for his use or to ascertain its true quality or condition, it is indeed hard to see why he is not at least entitled to expect good faith; or why he should be forced to take the risk that his apparent benefactor is knowingly imposing a curse upon him instead of conferring a benefit.

[3] Under the English decisions such a coal hole in a driveway would under such circumstances be held to be a "trap" within the meaning ascribed to that term by Willis, J. in Corby v. Hill, 4 C. B. N. C. 556 (1858) and the owner would have been liable even to a bare licensee, since it was his duty either to warn him of its existence or by lighting it to give him the opportunity to discover and avoid it. "A Trap," says Hamilton, L. J. in Latham v. Johnson & Nephew, L. R. (1915) 1 K. B. 398, 415, "is a figure of speech not a formula. It involves the idea of concealment and surprise, of an appearance of safety."

of firemen, or to contemplate and prepare for their entry into and use of places and appliances not held out as places and appliances to be entered and used by the ordinary business invitee or guest. Nor is it suggested that the owner is bound to inspect even his approaches to see if they are defective. Thus the case is not in direct conflict with any of the many cases which deny recovery to a fireman or policeman hurt while using an owner's roof as a platform from which to fight a fire or over which to pursue a criminal;[4] or injured by contact with uninsulated wires under the eaves of his roof;[5] or while using elevators to remove property from a burning building which were normally reserved for the use of employees;[6] or by falling into unguarded elevator shafts in a factory;[7] or by the fumes of chemicals erroneously assumed to be smoke from a fire.[8]

Everyone will agree, that, given a general duty in an owner to consider the safety of all those who, having the right or privilege to enter his premises, may be expected to enter it, the fact that the visitor's sole right or privilege is the unselfish gift of the owner would substantially diminish its extent. But the difficulty lies in finding either authorities for its existence or a basis on which to place it. The traditional method of dealing with the liability of the owner to one injured on his premises by its condition or his acts done thereon is to begin with the trespasser and then consider the bare licensee and finally the business guest.[9] The commonly accepted formula in America divides those to whom a landowner owes an obligation to consider their safety while on his premises into "licensees" and "invitees," or as more fully expressed "bare licensees" and "business invitees," and so by necessary implication denies the existence of any obligation to any one other than those to whom

[4]Woodruff v. Bowen, 136 Ind. 431 (1893); Greenville v. Potts, 107 S. W. 50 (Texas 1908); see Woods v. Lloyd, 13 Atl. 43 (Pa. 1888).
[5]New Omaha Thompson Houston Co. v. Anderson, 73 Neb. 84 (1905).
[6]Gibson v. Leonard, 143 Ill. 182 (1892).
[7]Hamilton v. Minn. Desk Co., 78 Minn. 3 (1899).
[8]Lunt v. Post Printing Co., 48 Col. 316 (1904).
[9]See Buckley, L. J. in Norman v. G. W. Ry., L. R. (1915) K. B. 584, 591.

an owner has thrown open his land by invitation or permission.

The only logical basis for such a formula, with its implied restriction of the owner's liability to those to whom he has invited or permitted to enter his premises, is that the owner being sovereign over his land, no one but he and those to whom he has thrown it open are concerned with its condition or what is done on it. so long as the effects are confined within its boundaries. If this be its basis it follows that it requires some words, act or conduct, intended to express a desire or willingness to admit a stranger, to give to him any concern with such conditions or acts; or at the least some words, acts or conduct reasonably to be construed as expressing such consent. If it is the owner's will to admit which brings his land within the purview of the law, it can only be open to those to whose use he elects to devote it.

If a case arises in which a court feels that a landowner ought to pay for harm sustained by one who is not in any true sense invited, allured or actually permitted by any act or conduct expressing real desire or consent to come on his premises, the customary method is to stretch to the breaking point the idea of invitation, allurement or consent, or to treat the case as if the condition of the land was a sort of nuisance.

To any one considering these cases free from the benumbing influence of this formula, it is obvious that whatever may have been the original immunity of a landowner, it has long been recognized that he does owe certain duties to persons whose presence is not due to any expression of desire or willingness on his part to admit them, or to any true invitation or license. Both necessarily imply words or conduct intended to express either a desire or a willingness. Yet landowners who leave unguarded dangerous conditions upon their premises accessible to places frequented by children have been said to have invited them to enter and meddle.[10] Yet

[10]It is generally though not universally held that a landowner may not create or maintain on his land any condition which may injure children, if, yielding to their childish instincts they meddle with it; if to his knowledge

clearly the landowner's conduct shows no desire for their intrusion.[11]

So the term licensee has been extended to include persons who are at best but tolerated trespassers. Mere failure to prevent the intrusion of a casual trespasser has never been held to give any right to consideration. He is not said to be permitted to enter because the owner has failed to exclude him. An owner is not bound to make his land intruder-proof, or to resist or even object to an intrusion which he knows is probable or even imminent, under penalty that his inaction will be construed as expressing a will to admit the intruder. Yet, where such intrusions upon a definite part of an owner's premises become constant or habitual, a failure to break up the practice is said to be a permission. There may be no objection to giving to such persons some right or even to giving the same rights as those whose presence is actually consented to by the owner,[12] but to consider passive toleration as equivalent to consent actually expressed by word or conduct, to regard an unwillingness to take the steps often difficult and expensive (sometimes actually impracticable in view of the use to which the land is put) as equivalent to an expression of consent to the intrusion, is to eliminate real consent as an element necessary to the obligation. And it would be the merest fiction to say that an owner who maintains an unguarded pitfall or danger on his premises so close to a highway that slight deviations

children frequent that part of his premises where the attractive danger is, or even if the danger is near and open to highway or public place frequented by children. Many courts limit, and it is submitted properly limit, the owner's liability to a danger which is not only abnormal but which is not necessary to the owner's legitimate use of his premises or where although the condition is necessary to such use, the danger in it is one which could be removed without undue expense or interference with its employment for the owner's purposes.

[11]See Hon. Jeremiah Smith, Landowner's Liability to Children, 11 Harvard L. R. 349–and 434, particularly pp. 352 to 360.

[12]In England where consideration for the tolerated intruder is carried to the utmost, such toleration does not give full status of even the barest of true licensees. He can only demand notice of any new and abnormal use which increases the danger which he has come to regard as incident to his habitual intrusion. He has never been held to have the right which the barest of true licensees have, the right to require the owner to disclose a concealed defect which to the owner's knowledge will make it dangerous for him to avail himself of the permission granted.

such as are incidental to its use may bring the traveller within its peril, thereby invites or consents to such deviations. Nor can such conditions be properly regarded as nuisances, since the condition can not be injurious to the traveller until he comes within the premises.

The numerous dicta and the few cases which deny recovery to a fireman, policeman or other public officer, who in the performance of his duty is injured by the bad condition of premises which as such public officer he has the right to enter, proceed upon the accepted American formula. Even though the owner had actually invited the visit of such an officer, even though his services are needed for the owner's protection, yet since the right is based on general public necessity and is not dependent on the owner's will (and would exist notwithstanding his most emphatic protest, if there was need of the visit, and, would exist even though the visit was of no benefit to the owner), it was correctly held that such consent as was given, and such benefit as in fact there was to the owner added nothing to a right perfect without them, and that therefore such officer was not an invitee. But it seems odd that once having so held, the courts should have regarded the officer as a mere licensee, for a license is as much creature of consent as an invitation, the only difference being in the owner's interest or lack of interest in the visit.

But that a public officer is not an actual licensee does not solve the problem. The question remains whether, though he is not an actual licensee, there is not authority and reason for an obligation in the landowner broad enough to include him under such circumstances as those in the recent New York case.

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(To be continued.)