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Landowner's Duty to Strangers on His Premises - As Developed in the Iowa Decisions

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LANDOWNER’S DUTY TO STRANGERS ON HIS PREMISES
—AS DEVELOPED IN THE IOWA DECISIONS

It is one thing to know a general rule of common law. It is another to know the application of the general rule, its variations and exceptions, in a particular state. Both are important. Without the first, the lawyer becomes the mere tradesman. Worse than that for him, he is often helpless, for with all the gray mule and spotted cow cases to which a benevolent digester directs him he does not sense the legally significant facts so that he can recognize an authority when he sees it. Without the second, even the lawyer with a grasp of fundamentals is at a disadvantage, for a single local case may upset the whole course of a carefully reasoned analysis. This and other discussions of Iowa law which appear in the pages of this magazine are published with the hope that an exposition and analysis of local decisions will be helpful to the profession. In general they blaze no new paths in jurisprudence. If they aid in a better understanding of what we already have their publication is justified.

In the present discussion, it is the purpose to discuss general principles of tort liability governing the occupier of land for harm suffered by outsiders on the premises. I have used the word “strangers” in order to connote a meaning which would exclude a discussion of those who stand in special relations to the landowner, as master and servant, landlord and tenant, and carrier and passenger. Some cases of this kind are cited but only when depending on general rules of law, not limited to the peculiar relation.

TRESPASSERS

It is not necessary here to discuss instances where the law will justify one in entering another's premises without his permission. Authority hardly seems needed for the undisputed rule that “every
unauthorized and therefore unlawful, entry into the close of another is a trespass,¹ and an unsupported dictum to the contrary which appears in an early Iowa decision may be disregarded.²

To the trespasser the landowner owes no duty to put his premises in safe condition or repair,³ or even to give warning of latent danger.⁴ This is but an instance of the favor with which the landowner has always been regarded by the common law. So long as he stays within his own boundaries, he may, with few exceptions, use the premises as he sees fit. The fact that people do in fact trespass on the land of others puts no obligation on the owner to make things safe for them. But the immunity is given him only in using the premises for his own affairs. If he creates the dangerous condition for the purpose of harming the trespasser he is liable for the latter's injuries. The Iowa "spring gun" decision is a leading case on this point.⁵

This broad immunity from responsibility is available only to the rightful occupant of the land. If the defendant whose dangerous agency has caused another injury is himself a trespasser or a licensee on the land of the owner, he cannot escape liability on the sole ground that the plaintiff's presence on the land was a legal wrong against the owner. The liability will depend upon the defendant's having acted with due care under the circumstances.⁶

Should the general rule granting immunity to the landowner for injuries resulting to trespassers from dangers in his premises apply

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²The statement is: "It is, perhaps, true that, by walking upon a railroad track at points away from public crossings, persons are not technically trespassers. A person who, for pleasure or from curiosity, enters a manufactory, and walks among the machinery, is not a trespasser in a legal sense." McAllister v. Ry. Co., 64 Iowa 395, 397. Such a person certainly is a trespasser, unless a license can be implied, a question hereafter discussed.
⁴A striking instance is Sutton v. W. J. & S. R. Co., 78 N. J. L. 17, where the deceased, trespassing on railroad land, stepped upon an unguarded electrically charged rail. No warning of danger had been given. His representative was denied recovery for his death. A dictum to the contrary by McClain, C. J., in Ambroz v. Light and Power Co., 131 Iowa 386, 389, is not in accordance with authority.
⁵Hooker v. Miller, 37 Iowa 613. See also Davis v. Bonaparte, 137 Iowa 196, 205.
when the victim is a child? This question has been the subject of hot controversy and has given rise to a multitude of decisions, referred to as the "Turn-Table" or "Attractive Nuisance" cases. It is not necessary here to review the well known arguments set forth with much vigor, and often asperity, on one side or the other, nor to determine the extent to which the doctrine has been carried in other jurisdictions.  

We could think more clearly on this subject if we ceased to camouflage the landowner's liability with a setting of vituperative epithets about one who has "allured," "enticed" or "trapped" innocent children. We need no new rules of law to care for the man who would actually do such an act. The fact is, as everyone knows, that the landowner has the dangerous object on the place in the course of his use of the premises. The existence of something that children like to play with on a man's land does not mean that he invites the children to use it, dicta to the contrary notwithstanding. With equal truth we could say that a railroad invites a pedestrian walking along a muddy road to use its well drained track for his travel.

We should admit that a child who comes without permission to play upon a turn-table or anything else on another's land is technically a trespasser. And children are at law liable for trespasses the same as adults. The admission does not necessarily mean that the proprietor incurs no responsibility by reason of the unwelcome visit. The structure of civilization would not be shaken if the law made an exception in favor of the child by cutting down the landowner's freedom from liability to trespassers. Such a change might impair the logical consistency of our rule. But logic is not necessarily law. "The law is a practical science, having to do with the affairs of life, [and] any rule is unwise if in its general application it will not as a usual result serve the purposes of justice." The whole question seems to be whether it is better policy to leave the landowner with his almost absolute immunity, or to impose a duty on him to safeguard trespassing children too young to care for themselves. The chief difficulty with the answer made by most authorities, that there is an obligation owed to the child, is

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1Judge Jeremiah Smith, in two well reasoned articles, sets out the negative answer to the question in 11 Harv. L. Rev. 349, 434. Even notes listing cases on the point are too numerous to set out here. They are listed in L. R. A. Index, heading, "Negligence" §§ 23, 23a.

2As for example in Wilmes v. R. Co., 175 Iowa 101, 108.

that of determining the extent of the duty. It is common knowledge that nearly everything new is attractive to childish curiosity. A wood pile, garden tools, machinery, fires, ponds, what will not make a setting for a fine new game? Is the landowner, then, to be compelled to lock up everything against youngsters never initiated into the rules of trespass q. c. f.? Courts allowing recovery for an injury on a railroad turn-table have not infrequently met with difficulty in deciding how far the doctrine was to be followed.

The Supreme Court of Iowa allowed a trespassing child to recover for injuries sustained on a turn-table in the well known Edgington case in 1902. The carefully reasoned and thorough opinion of Weaver, J., reviews the cases and discusses principles. The property owner, says the Court, is not an insurer of the safety of children who come upon the premises. "His obligation is simply that which attaches to every member of society when he undertakes to exercise a personal right in a manner which may affect the welfare or safety of another member,—the obligation of reasonable care." Without quibbling the duty of reasonable care is recognized, despite plaintiff's status as a trespasser. Precautions demanded will vary, naturally, with the degree of danger and the remoteness or proximity of the premises from places where children are to be expected.

It is worthy of note, however, that the Court, with but two exceptions, has denied recovery in every case since the Edgington decision that has come before it, where plaintiff's claim was based upon this "Attractive Nuisance" doctrine, though several times it has approved and affirmed the rule of that case. One of


the cases where recovery was allowed was another suit to recover for injuries sustained on defendant's turn-table.\textsuperscript{12} In the second, recovery was allowed a boy who was hurt when his fingers were caught in a block and tackle arrangement used to hoist a telephone cable.\textsuperscript{13} The apparatus was used on a public street near a school, and there was no one to guard it. It is true of course that the child was a trespasser in touching another's property.\textsuperscript{14} But he had as much right on the street as defendant, whose defense must have rested on some other doctrine than landowner's immunity. It is not meant to intime that the decisions subsequent to the Edgington case are wrong. The course of decision does show, it is submitted, that our Court is going to be very careful in applying the attractive nuisance doctrine. That is good sense, for in some states the rule seems to have swept the courts off their feet.

One further liability of a landowner for defects in his premises to one coming without permission is to be noted. If the premises adjoin a highway the landowner must not make an excavation or create obstructions so close to the way that travel is unsafe by reason thereof. The true test for liability is said in an English case to be "whether the excavation be substantially adjoining the way."\textsuperscript{15} The question seems not to have come up in Iowa. In \textit{Earl v. Cedar Rapids et al.},\textsuperscript{16} the plaintiff recovered for injuries sustained in falling into an unguarded cellarway, which projected from land of one of the defendants into the public street. The case does not therefore involve liability for such danger existing entirely on defendant's own land adjoining the highway, nor even the responsibility of one who gives his adjacent premises the appearance of being part of the highway.\textsuperscript{17} Authorities in other jurisdictions are abundant enough to establish the duty as a rule of law.\textsuperscript{18}

\textsuperscript{12}Taylor \textit{v. Ry. Co.}, 180 Iowa 702.
\textsuperscript{13}Ashbach \textit{v. Iowa Tel. Co.}, 165 Iowa 473.
\textsuperscript{14}Judge Weaver emphasizes this point in the Edgington case in discussing another decision based on a street accident, used as an authority for the attractive nuisance doctrine. See pp. 421, 422 of the decision.
\textsuperscript{15}Hardcastle \textit{v. South Yorkshire etc. Co.}, 4 Hurl. & Nor. 67.
\textsuperscript{16}126 Iowa 361.
\textsuperscript{17}On this point, see note in 51 L. R. A. (N. S.) 1215.
\textsuperscript{18}Collections of cases may be found in 26 L. R. A. 686; 5 L. R. A. (N. S.) 733.
TRESPASSERS INJURED BY ACTS OF DEFENDANT

Liability of the landowner for injuries received through acts done to the trespasser will in many instances depend upon whether the injured person’s presence was actually known to the defendant. The trespasser whose presence is unknown to the landowner cannot recover for injuries he receives. The reason is not because by his trespass the plaintiff is guilty of contributory negligence, as our Court has on occasion intimated. An unseen trespassing child too young to be negligent himself cannot recover any more than an adult. The reason the unseen trespasser cannot recover is that no duty is owed to him. This is clearly set out in two Iowa decisions and shows that the statement in Murphy v. R. Co., to the effect that the only difference between the duty owed to trespasser or licensee “would be upon the facts constituting the measure of diligence required” is incorrect. There being no duty to the trespasser, no diligence is required. Since there is no duty, he cannot avail himself of rules of the company requiring signals and a lookout. “Actionable negligence is the breach of a duty owing by defendant to plaintiff, and where there is no duty there is no negligence,” says Judge Deemer. Rules in other states vary. In some jurisdictions landowners, if they are railroads, are required by decision or statute, to watch for trespassers. Our own cases are

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28In Masser v. Ry. Co., 68 Iowa 602. Contributory negligence will be a bar to an action based on defendant’s negligence whether plaintiff is a trespasser or not. And some cases may rest on that ground. See Murphy v. R. Co., 38 Iowa 539; McAllister v. Ry. Co., 64 Iowa 395.
29Iowa 539.
30In Upp v. Darner, 150 Iowa 403, 406. This is clearly set out by Deemer, J., in Thomas v. Ry. Co., 93 Iowa 248, 255, and by Salinger, J., in Papich v. Ry. Co., 183 Iowa 601, and of course shows that the statement in Murphy v. R. Co., 38 Iowa 539, to the effect that the only difference between duty owed to trespasser or licensee “would be upon the facts constituting the measure of diligence required” is incorrect. There being no duty to the trespasser, no diligence is required. Since there is no duty, he cannot avail himself of rules of the company requiring signals and a lookout. Burg v. Ry. Co., 90 Iowa 106.
30For a decision so holding, and discussion, see 2. Iowa Law Bulletin 98. Collections of cases on this point, setting out the varying circumstances when such lookout is required, may be found in 25 L. R. A. 287 and 8 L. R. A. (N. S.) 1069.
clear. Railroads are not required to watch for trespassers; they owe no duty until the uninvited visitor is actually discovered; and it is immaterial whether he be infant or adult. Of course the same exemption from duty would apply to other landowners. Indeed where the courts have declared a duty to watch for trespassers, it seems only to apply to railroads.

This freedom from responsibility for the undiscovered trespasser is not adequately explained by saying that his presence is not to be anticipated. As a matter of fact, people frequently do trespass on the land of others, especially on railroad property, and every one knows it. But the jury may not consider the frequency of trespassing at a given point, even in determining the question of actual knowledge. The reason must be fundamentally the same as the exemption of responsibility for condition of the premises: that it is a socially desirable policy to allow a man to conduct his own lawful business on his own land in his own way, without the burden of watching for and guarding those who come there without permission or right. If this is not sound policy, or if it once was, and is no longer, then the law ought to be changed. But a court would hardly upset a rule so firmly established as this one is and if a change is to be made, it will have to come through legislation. The very important practical question, what facts will change a plaintiff from trespasser to licensee, will be discussed later.

If the trespasser is actually discovered by the landowner, an entirely different situation is presented. Is the proprietor now to be allowed to disregard the rights of this man as a human being because he has come without right? The trespasser is no outlaw, with a price upon his head. Probably mere knowledge of the pres-

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\*\*As in Murphy v. R. Co., 38 Iowa 539.\*\*\*

\*\*Thomas v. Ry. Co., 93 Iowa 248.\*\*\*
ence of the trespasser would place no duty on the landowner's part to give him warning, even of hidden dangers in the condition of the premises. The law in general requires no man to play the good Samaritan, and it is hard to see how the wrongful presence of the plaintiff on defendant's land would increase the former's rights. But there is a fundamental distinction between failing to help a man and doing him harm, between the priest and the Levite who merely passed by on the other side, and the thieves who beat and wounded the victim in the parable. Failing to do a thing and doing it badly, are wholly different things in the eyes of the law.

All courts agree that the trespasser has some rights. He must not be intentionally harmed; even in ejecting him no more force can be used than is reasonably necessary. Beyond this, authorities are divided. One rule, that of the majority, often called the Michigan rule, gives the seen trespasser the protection of ordinary care on the part of the landowner, the usual test for responsibility for injuries sustained through negligence. By the other rule, called the Massachusetts rule, the trespasser can claim only freedom from reckless and wanton misconduct, something very much akin to intentional injury. The Michigan rule gives the trespasser the rights of an ordinary human being, no more, no less. If it is too

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2This refers to cases where there is, between the parties no relation, either imposed by law or assumed by the parties, creating a duty of affirmative action. See on the subject of such duties, "The Moral Duty to Aid Others as a Basis of Tort Liability", F. H. Bohlen, 56 Amer. L. Reg. (O. S.) 217.

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2C. L. 557, 558. In Adams v. Ry. Co., 156 Iowa 31, plaintiff was a trespasser on defendant's premises in a helplessly intoxicated condition. He was ejected and suffered injuries from exposure. The court said that even in exercising the privilege of ejecting him, defendants must exercise reasonable precaution for his safety.

The two rules are discussed, with a strong argument for the Michigan rule in an article "Duty to Seen Trespassers", by Judge Robert J. Peaslee, 27 Harv. L. Rev. 403. Sometimes they are carelessly stated in alternative language as though each meant the same thing. See 20 R. C. L. 60.

Statement of the landowner's liability in terms which thus require the existence of a substantially criminal state of mind as does the "reckless and wanton misconduct" test, is said to have come from the fact that the common law writ of trespass, which was in its essence criminal, included within its scope offences committed by a landowner upon his own premises. See Prof. F. H. Bohlen, in 69 U. of Pa. L. Rev. 237, 238, March, 1921.
much trouble to take ordinary care to avoid hurting him, he can be ejected. Until that is done, is he not entitled to as much care from the defendant as any stranger?

A long line of Iowa decisions announces and applies to varying facts the rule that after discovering a trespasser upon the premises, there is a duty upon the landowner and his servants to exercise ordinary care to avoid injury.⁵⁰ Along with this formidable array of decisions are found scattering cases in which statements appear, usually as gratuitous dicta, announcing the test of intentional wrongdoing, or wanton and reckless misconduct as a criterion for defendant's liability. Some of these come from indiscriminate citations of cases from other jurisdictions, without careful attention to our own decisions.⁵¹ If a clear statement by a judge can ever settle the law, surely the following one by Judge McClain in Gregory v. Wabash Railroad Co.,³² should have left no room for vacillation in this State. He is speaking of the duty to a seen trespasser, in answer to an argument raised by defendant who complained of an instruction given by the trial judge.

"It may be true that in some of the cases of this character this court has referred to the willful and wanton character of the acts of railroad employees in failing to take reasonable precautions to avoid injury after the trespasser was seen; but certainly this court has never announced the rule that under such circumstances the company will not be liable unless the conduct of its employees was intentional, willful, or wanton; and, so far as we can discover, the rule uniformly adhered to has been that if, after the employees in charge of the train became aware of danger to a trespasser on the track, they can, by the exercise of such care as a reasonably prudent person would exercise under the circumstances—that is, the highest possible degree of care in view of the fact that human life is involved—avert such danger, it is their duty to do so; and the company will be liable for their failure in this respect, which failure will be attributed to the company as negligence."

This clear statement seems to have been overlooked in a small group of cases since which have reverted to the "wanton and reckless" formula. Where they apply it, however, they say that the

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⁵²126 Iowa 280, 283.
finding of "willful negligence" can be sustained by evidence showing lack of due care after the trespasser and his danger are discovered. This reaches the same result as the straight test of negligence, but the language is confusing and inaccurate.\textsuperscript{33}

What constitutes the exercise of ordinary care to a seen trespasser will vary with the circumstances. An engineer in charge of a train does not need to stop upon discovery of an object on the track, nor even if he sees that the object is a human being.\textsuperscript{34} The engineer may assume that an adult, in apparent full possession of his faculties will get out of the way. It is when it becomes apparent that he is oblivious to danger, or cannot get out of it, that drastic action must be taken.\textsuperscript{35} The case is different with children—their very presence on the track denotes danger.\textsuperscript{36} Generally the question of the sufficiency of precautions taken is a jury question, and the verdict will not be disturbed when it finds support in the evidence.\textsuperscript{37}

One line of decisions is hard to reconcile with the general rule that the seen trespasser may demand due care from the proprietor to avoid injury to him. The case of \textit{Denny v. C. R. I. \& P. Ry. Co.}\textsuperscript{38} presents the typical set of facts. The plaintiff sued for injuries sustained by his minor daughter. She, by misrepresenting herself to be a relative of an employee, had procured a pass on the railroad. While on her return journey, the passenger train collided with a freight train, caused by a misplaced switch. It seems to be granted that this was negligently caused. Yet in the absence of a showing

\textsuperscript{33}\textit{Tarashonsky v. Ry. Co.}, 139 Iowa 709 (note, too, that the child injured was a licensee); \textit{Trotter v. Ry. Co.}, 135 Iowa 1045. \textit{Ambroz v. Light \& Power Co.}, 131 Iowa 336, seems to go even further, for it talks as if this finding of wantonness might be sustained if steam was suddenly discharged without warning. If defendant knew people were reasonably likely to be in front of the pipe. Is there then a duty to a trespasser not discovered, but who could be expected?

The statement of the willful injury rule by Salinger, J., in \textit{Papich v. Ry. Co.}, 183 Iowa 601, is not supported by the very authorities given, and is not necessary to the decision.

\textsuperscript{34}\textit{Burg v. Ry. Co.}, 90 Iowa 106, 121.


\textsuperscript{38}150 Iowa 461.
of willful or intentional wrongdoing by defendant, the plaintiff was
denied recovery. This decision seems to represent a general rule—
that the injured person in such a case can only claim the right to be
free from willful or intentional injury. It is supported by author-
ity even in Iowa where for years there has been a statute making
railway companies liable for all damages sustained by any person,
including employees, for negligence, mismanagement, or willful
wrongs.

Consider the situation on principle and general authority for a
moment. It is conceded that a plaintiff in the situation set forth
is not a passenger; he is not entitled to an instruction in his favor
calling for that peculiar degree of care supposed to be awarded
persons of this description. We may call him a trespasser if he
fraudulently avoids paying his fare. If the injury comes to him
before his is discovered the authorities already discussed would
deny a recovery because no duty is owed him. If it occurred
through defects in car or track, he could not complain that premises
were not made safe for him, under authorities also set out above.
But when he is negligently hurt after his presence is known, why
is he not entitled to recovery just as much as the man hurt while
trespassing on the right of way? If a conductor negligently ejects
him from a moving train, the company is liable. Is the case pre-
sented different because the particular employee whose negligence
caused the injury did not know of the plaintiff’s presence? Such
knowledge does not seem to be required in order to give the seen
trespasser in other places protection from negligence. In a leading
case on the subject the plaintiff trespassing in defendant’s
circus tent, was hurt by the explosion of a giant firecracker, the
explosion being part of the entertainment provided. It is exceed-
ingly improbable that the clown who set off the firecracker knew
of the presence of this individual boy in the audience. The Court

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"Hutchinson on Carriers, 3rd ed. § 1001.


"As was the case in Graham v. Ry. Co., 131 Iowa 741.


did not require it. It was enough that his presence was known to entitle him to due care.

Does the law distinguish the trespasser in the car and the trespasser on the track because the former is felt, consciously or unconsciously, to be a greater offender? Trespass on land, especially railroad land, is a most venial offense; everyone commits it on occasions. Evading fare is more serious. Has that influenced the course of decision? If it has, it would seem to be what a colleague calls "maladjusted civil penology." The punishment doesn't fit the crime. For an offense comparatively trivial, for which the punishment would ordinarily be a light fine, this plaintiff must be a cripple for life without redress. The penalty is too heavy for the wrong done.

**Licensees**

We may consider a licensee one who comes on another's premises for his own purposes solely, with the owner's acquiescence or permission, through no contractual agreement with the owner. With regard to claims for injuries resulting from the condition of the premises, the licensee is little better off than the trespasser. He is not liable at law for his entry. But his situation resembles that of the trespasser in that he can claim from the landowner no general duty to make the premises safe or comfortable for his reception. He takes the place as he finds it. If he insists on looking his gift horse in the mouth, the law will not listen to his complaints about what he has found.

In one respect only does the licensee have an advantage over the trespasser regarding the condition of the premises of the landowner. He is entitled to warning of hidden dangers the existence of which is known to the licensor. Even this duty on the licen-

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"29 Cyc. 451.
"O'Donnell v. Ry. Co., 69 Iowa 102; burner v. higman & skinner Co., 127 Iowa 580; Davis v. Bonaparte, 137 Iowa 196, 205 (note that in this case Judge Deemer, saying that defendant is liable only for intentional or wanton injury is speaking in a case which involved no liability for acts done, but condition of the premises); Rutherford v. Ry. Co., 142 Iowa 744, 754 (here it is said, obiter, the duty is no higher than to a trespasser. This is not quite accurate); Wendt v. Akron, 161 Iowa 338; Whines v. R. Co., 175 Iowa 101. For general collection of cases, see 13 L. R. A. (N. S.) 1126.

"29 Cyc. 450. Campbell v. Boyd, 88 N. C. 123, is an excellent illustration, though the language goes beyond that necessary to care for the facts. De-
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sor's part is sometimes denied. The point seems not to have come up for decision in Iowa, but the duty was recognized in a dictum in one decision. A persuasive analogy for this protection to the licensee is found in cases making a gratuitous bailor of a chattel liable for injuries sustained by the bailee in its use, when, and only when, the bailor knew of a concealed defect and gave no warning. Should not the same rule apply to the permissive use of land?

Turning from responsibility for the premises themselves to acts done to the licensee while on the premises, expressions are not wanting that the only duty to licensees is to refrain from reckless and wanton injury. But Iowa cases are clear that the duty is higher than this. Due care must be used to avoid injuring the licensee by affirmative acts of negligence. This is to be expected, when the seen trespasser is given such protection. But the licensee may not only ask that care be used with regard to him after his presence is known, but that due care be used to discover him as well. This is clear under the Iowa decisions, however confused

*Watson v. Ry. Co., 41 Colo. 138, 92 Pac. 17. The danger in this case was perfectly open however. In 20 R. C. L. 59 the duty as to trespassers and licensees is said to be the same as to condition of premises. It is doubtful from the very general language whether this particular point was considered.


*See Johnson v. Bullard Co., 111 Atl. 70 (Conn.), and comment, with citation of cases, in 19 Mich. L. Rev. 93 (Nov. 1920), and 6 Cornell L. Quart. 86 (Nov. 1920).

*"His presence on the company's land being merely permissive, the only duty which the company owed him was to abstain from acts willfully injurious." Fitzpatrick v. Cumberland etc. Co., 61 N. J. L. 378.

authority may be elsewhere, and careless dicta to the contrary may be disregarded.

The broad distinction then, is between the duty to maintain safe premises, which the licensee may not claim, and the duty to refrain from affirmative acts of negligence, which he may. Can a licensee complain of injuries suffered by a change in the condition of the premises, which makes them less safe for him than at the time the permission was granted? Suppose that the plaintiff, by acquiescence, was allowed to cross a piece of land which the owner used in stone quarrying operations. Could he complain if in the course of the business the operations gradually extended toward the path so it eventually became unsafe to use? Would it not be a stronger case for him if the change was made suddenly, without warning, and he was hurt? Even on such facts recovery has been denied. But there is good authority holding that a sudden change making the premises unsafe, when made without warning, gives an injured licensee a cause of action.

The point has had little discussion in Iowa. It has been held that one who dug a well on unfenced land, in a county where there was no enactment prohibiting stock from running at large, and did not guard it, was liable for the loss of a horse which fell in. The case of Wendt v. Akron comes fairly close to the point. The plaintiff by defendant’s permission or acquiescence, which it had power to grant, had placed certain cellar and area ways in the highway. He maintained that the defendant, by carelessly making

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8 Haughey v. Hart, 62 Iowa 96. The Court assumed the horse was rightfully on the land. Compare Beinhorn v. Griswold, 27 Montana 79. There too, the owner was not liable for the trespasses of the cattle on defendant's land. But the position was taken that the cattle were no better than trespassers, and the landowner was not liable for their death from drinking' cyanide solution left in open vats on his land.

9 181 Iowa 338.
changes in grades and gutters, caused his premises to be flooded, to his damage. A judgment in his favor was affirmed.

**LICENSE IMPLIED THROUGH USE.**

It is apparent that while the position of trespassers and licensees are alike in many respects with regard to their claims against a landowner, yet there is much practical difference in their rights. The question comes up most frequently in cases where an injury has occurred on a railroad right of way. Some one has been run over by a train. It is claimed that the defendant's employees did not see him in time to avert the accident. If the victim was a trespasser, that is a complete answer to his claim for damages. If he was a licensee, under our decisions, he can insist that it was defendant's business to use care to discover him, and may recover if they were negligent in that respect, provided that he was not himself contributorily negligent. Very seldom would a person in such a situation be able to show an express permission from the railroad company to use its land as a thoroughfare. But in every town there are portions of the right of way where public use is so frequent that well defined paths are worn along the tracks. Is one using such a path to be called a trespasser?

It is said to be the general opinion that an invitation (and presumably permission) cannot be implied from a mere toleration of trespassers. Here is an instance where local authority is of extreme importance. Our Supreme Court has said that something more than mere use must be shown to make out a license. There must be something from which consent may be inferred. But this statement alone is misleading, because the something more does not require any affirmative act of assent on the landowner's part. Many cases have allowed the jury to find a license where property

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61 If he was, then his only chance for recovery is under the Last Clear Chance doctrine, which is applicable in Iowa only when the plaintiff's peril has been discovered. This is discussed in 5 Iowa Law Bulletin, p. 36.

62 20 R. C. L. 64.


has been constantly used, with the knowledge of the landowner's employees, (usually a railway) and no objection has been made thereto. "It is the knowledge of the constant use of the tracks that binds the railroad company." Nor do these cases require knowledge on the part of important officials that the use is being made, though in some of the cases the plaintiff's case has been helped by this, or other facts additional to the known custom. It is a pertinent observation that most of the cases have come before the Supreme Court after a finding of a license by the jury. If use, plus knowledge of the use without protest, will allow a jury to infer a license the plaintiff will seldom fail on this ground. And just that seems to be the rule of our decisions. Limitations on its application are set out in the note.

**Invited Persons**

The chief difficulty met with in determining the protection owed by the landowner to "invited persons" or "invitees," is in ascertaining who comes within that class. The orthodox statement is something like this:

"But if [the landowner] expressly or by implication invites others to come upon his premises, it is his duty to be reasonably sure that he is not inviting them into a place of danger, and to this end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

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Booth v. Union Terminal Co., 126 Iowa 8, 13.

Where a railway company had provided two safe means of entrance and exit from the station, even the persistent use of a path used by people as a short cut will not be a foundation for an inference that such use was permissive. Heiss v. Ry. Co., 103 Iowa 690; followed in Wagner v. Ry. Co., 122 Iowa 360, S. C. 124 Iowa 462, the railroad having provided a safe place for people to walk, cinder paths between the tracks, the license was limited to use of these paths. Cf. Pulley v. Ry. Co., 94 Iowa 665. And where a path the use of which is licensed crosses a track, the license is suspended while the path is obstructed by cars. There is no license to crawl under. Wagner v. Ry. Co., supra; Papich v. Ry. Co., 183 Iowa 601, 608.

Judge Deemer in Rutherford v. Ry. Co., 142 Iowa 744, says that the owner of stock which has escaped on the railroad right of way is licensed to go thereon to recover it.

This is from Upp v. Darner, 150 Iowa 403, 407. Equally broad inclusive language may be found in Witsey v. Jewett, 122 Iowa 315, and in Gardner v. Waterloo etc. Co., 134 Iowa 6. For similar statements see 20 R. C. L. 55; 2 Cooley on Torts, 3rd. ed. 1259.
The looseness of this phraseology can be demonstrated by putting two hypothetical cases. A, a landowner, sees his neighbor B cut across his back yard each day on his way to town, and makes no objection. This is sufficient, under Iowa decisions, to furnish a basis for inference that B's use is permissive. But it puts A under no further obligation with regard to the premises than to give notice of concealed dangers known to him. Presumably B's status would not change if he asked and received permission from A to use his yard as a thoroughfare. Now suppose that A, in a spirit of neighborliness says to B, "Don't you want to make use of my yard as a short cut to town?" Does that make B when he accepts, an invited person in the eyes of the law and impose upon A the obligation to keep the premises in repair for B?

Civilization will not come to an end whichever way this ease is decided. But the point has practical importance and we ought to know the law with certainty. Solution should not be difficult when the exact issue is defined. Our landowner A gets nothing out of B's use of the premises in either of the cases supposed. In either case it is a pure gratuity on A's part; B does not use the path because A asks him to, but because it is convenient for him and for his interest to do so. Why then put on A the burden of making things safe for B? Would not the more reasonable rule be to place the affirmative obligation for care of the premises on the landowner only when the visitor's business concerns the landowner? The test would be, not whether the visitor comes by acquiesence (thus being a bare licensee,) or by outright invitation, but what does he come for? Is it an errand in which defendant has an interest? Professor Bohlen thus states it:

"It is submitted that while everyone is bound to refrain from action, probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon any one save as the price of some benefit to him."

General statements, then, about a duty to persons present on land "by invitation express or implied," while good enough in their way where the plaintiff is clearly a business visitor, leave the exact question unsettled. It is not disputed that there may be found

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\[\text{This line of argument is well developed in the brief of Mr. John L. Thorndike in the Massachusetts case of Stevens v. Nichols, 155 Mass. 472. It is reprinted in the report of the case which appears in Ames and Smirth, Cases on Torts (Pound's ed.), p. 214.}\]

\[\text{83 American L. Reg. (O. S.) 209, 220. In the discussion the author develops the growth of the law upon which this generalization is based.}\]
more exact statements making the fact of invitation and not the nature of the business as the test of the duty. The following is a sample:

"The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby."\(^7\)

On the other hand note the careful statement in Shearman and Redfield on Negligence: \(^7\)

"The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him........"

So Judge Cooley, who in one place states in the broad language the rule as to invitation, says later on, \(^7\)

"An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it."\

And a difference in duty based upon the nature of the errand that brings a stranger upon an owner's premises, finds adequate support in the cases. \(^7\)

All this goes to establish as the legal meaning of "invited person" not that of common parlance, but the description of one who comes on premises in connection with the enterprise carried on there; the invited person is a "business guest" if a wide meaning be given the word business. It is worth noticing that however


\(^6\)th ed. § 704. The italics are my own.

\(^7\)Cooley on Torts, 3rd ed., 1265.

\(^7\)"The class to which the customer belongs includes persons who go upon business which concerns the occupier, and upon his invitation, express or implied". Willes, J., in Indermaur v. Dames, L. R. 1 C. P. 274. For careful judicial language to the same effect, see, Marshall, J., in Hupfer v. Nat. Distilling Co., 114 Wis. 279; Vickers, J., in Pauckner v. Wakem, 231 Ill. 276, 279; Gaynor, J., in Forbrick v. General Eleat. Co., 92 N. Y. Supp. 36.

On this ground it has recently been decided in Wisconsin that a social guest, injured by reason of an alleged dangerous condition in the host's premises, could not recover. Greenfield v. Miller, 180 N. W. 834, commented upon 19 Mich L. Rev. 572.
broadly the statement is made in our Iowa decisions about a landowner's duty to those "present by invitation express or implied" all the cases allowing recovery have been those of plaintiffs present on business in some way connected with defendant's beneficial use of the premises.

Once the persons entitled to protection are ascertained, the rule is clear enough. Visitors of this class are entitled to call for reasonable care on the part of the landowner to protect them from harm resulting from the condition of the premises whether the peril is known to the landowner or could have been discovered.

"Burk v. Walsh, 118 Iowa 397, customer in a store falls down an unguarded elevator shaft. Even if he came in by a way not open to the public, he is entitled to protection once having reached the place where the public is invited to come; Wilsey v. Jewett, 122 Iowa 315; retailer's clerk goes to wholesaler's wareroom for goods, falls down an unguarded shaft in a dark room; Gardner v. Waterloo etc. Co., 134 Iowa 6, employee of lumber company brings ordered merchandise to defendant's premises and falls into unguarded elevator shaft; Burner v. Higman etc. Co., 127 Iowa 580, drayman coming for goods falls into unguarded elevator shaft; Young v. People's Gas etc. Co., 123 Iowa 290, postman goes to defendant's car barn to pick up mail from boxes carried on street cars in accordance with contract between postal authorities and defendant, and falls into open pit; Sntpss v. R. Co., 164 Iowa 530, plaintiff injured by explosion of gas trying to start pump to water stock in defendant's yards; Gilbert v. Hoffman, 66 Iowa 205, plaintiff admitted as guest in hotel without being warned of the known existence of small pox therein.

The customer in a store is a typical case of an "invited person" and details of the duty owed him have been pretty well worked out. See collections of cases in 21 L. R. A. (N. S.) 456; L. R. A. 1915 F. 572. The nearest case found in Iowa is Oaks v. Ry. Co., 174 Iowa 648.

Most of the cases involving the responsibility of railroad companies for failure to provide adequate lights, platforms, depots and the like are instances of this same duty. While some of the cases where recovery for injuries is sought against the company may turn on the special relation of carrier and passenger, most of the rules are equally applicable to protect a person coming to the premises to send a telegram, get information about freight rates or call for an express package. A safe place to alight from trains must be provided; McDonald v. R. Co., 26 Iowa 124; Merryman v. Ry. Co., 135 Iowa 591; but this does not include personal assistance usually; see also on this Rabin v. Ry. Co., 74 Iowa 732, but if assistance is given, it must not be given carelessly, Ray v. Ry. Co., 163 Iowa 430; McGovern v. Ry. Co., 136 Iowa 13. Care must be
by him in the exercise of due care." The protection to which the
visitor is entitled extends not only to the premises themselves, but
to what is done there, even by third parties, if the defendant in the
exercise of due care could have anticipated the danger and guarded
against it." Our plaintiff may also demand that due care be
taken in the doing of affirmative acts by the owner or his servants
on the premises not only after he is known to be there, but also if in
the exercise of care his presence could have been discovered."!

used to provide safe access to trains, Mattieson v. Ry. Co., 125 Iowa 90;
Dineckmann v. Ry. Co., 145 Iowa 250. Likewise, due care for proper
lighting, Hatt v. Ry. Co., 96 Iowa 169; Drumkyn v. R. Co., 153 Iowa 479;
Whitman v. Ry. Co., 153 N. W. (Iowa) 1023; sed quaere in this case whether
plaintiff was entitled to such protection, see comment in 2 Iowa Law
Bulletin 40; and a safe means of exit must be exercised, Cotant v. Sub-
urban Ry. Co., 125 Iowa 46. Ordinary care is the limit of the obligation;
there is no insurer's liability. McNaughton v. Ry. Co., 136 Iowa 177.

"Connolly v. Des Moines Inv. Co., 130 Iowa 633. See Garfield etc.
Coal Co. v. Rockland etc. Co., 134 Mass. 69, 67 N. E. 363, for an instance.

So a railroad is liable for rape committed upon a passenger by a
brakeman, Garvik v. Ry. Co., 131 Iowa 415; and an assault on a passenger
by a brakeman, even though the latter is actuated by the motive of per-
sonal revenge. Fagg v. R. Co., 175 Iowa 469. But not for an assault
by strangers that there was no reason to anticipate, Felton v. Ry. Co.,
69 Iowa 577. The same responsibility has been applied in other thas
carrier-passenger cases. Thus a company maintaining an amusement
park is liable to a colored patron for injuries from an attack from a
crowd of hoodlums, where defendant knew of the threatened danger, but
failed to warn the plaintiff; Indianapolis St. Ry. Co. v. Dawson, 31 Ind.
App. 605, 63 N. E. 209. A pool-room proprietor was held liable to a
customer for injuries in a brawl engaged in by fellow patrons in Moone
v. Smith, 65 S. E. 712. (Ga.) In Williams v. Mineral City Park Assn.,
128 Iowa 32, the plaintiff, a patron of defendant, was struck by a bottle
dropped or thrown by a stranger. The Court refused to interfere with
a jury's finding on the evidence returning a verdict for defendant. The
duty was recognized.

Cases of the responsibility of the proprietor of a theatre, fair, or other
places of amusement furnish the most picturesque examples of the duty
of the land occupant to patrons. For collections of cases see 3 L. R. A.
(N. S.) 1132; 19 ibid 772; 32 ibid 713; 42 ibid 1070. The cases in these
annotations treat of the duty as to the premises themselves, and also
the responsibility for failure to protect patrons from the acts of per-
formers and fellow seekers of entertainment.

"Weymire v. Wolfe, 52 Iowa 533, saloonkeeper expels a helplessly in-
toxicated customer who suffers from exposure; Watson v. Ry. Co., 66 Iowa
164, teamster unloading lumber injured when car is backed against
lumber car; McMarshall v. Ry. Co., 80 Iowa 787, conductor on a railroad
Established rules governing contributory negligence are applicable. The Iowa decisions are set forth in the notes.

The landowner's liability for unsafe premises brought about by lack of adequate precaution in work done by an independent contractor is a troublesome question to settle. In Wood v. Indep't School District the defendant contracted with a firm to dig a well in the school house yard. Certain machinery used in the work was negligently left unguarded, and the plaintiff, a pupil in the school, was injured while playing on the machinery. The Court held the district not liable, thus stating the rule:

"Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor, the employer is not liable for injuries resulting therefrom; but if the work is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor. In the case at bar, the work to be done was not dangerous; it was the machinery with which it was done that was dangerous."

If this kind of a municipal corporation was liable for defective premises at all it is hard to see how it could escape liability for the condition of its premises merely because the condition was created by the contractor. That defence has been raised in some of the cases where a proprietor of an amusement place has been sued for damages from injuries received by patrons during the course of a performance. The defendant says the show troupe was under

injured while stepping on defendant's adjoining track to signal; Carver v. Ry. Co., 120 Iowa 346, mail carrier hit by mail sack carelessly thrown from train; Reilly v. Ry. Co., 122 Iowa 525; Christiansen v. Ry. Co., 140 Iowa 345, plaintiff run into when he went forward to look after his stock when train stops.

The rights of persons at railway crossings might be referred to here. The cases are not directly in point however, because even at a private crossing the traveller goes upon the property not by defendant's permission or invitation but in his own right. See on the general duty Bettinger v. Loring, 168 Iowa 103; Dombrezas v. Ry. Co., 174 N. W. 596; private crossing, Ressler v. Ry. Co., 152 Iowa 449.


"44 Iowa 37.

"The rule was approved in Van Winter v. Henry County, 61 Iowa 684, and applied to make a county liable for a dangerous highway.

"A school district is not liable for personal injuries sustained on account of the negligent construction of its school-house, or negligence in failing to keep it in repair. Lane v. District Township, 58 Iowa 462. See also DILLION, MUNICIPAL CORPORATIONS, 5th ed., §§ 1638-1640.
the management of an independent contractor, and he is not liable. But he is held if he failed to take reasonable precautions for his patrons, to whom he owes an affirmative duty which cannot be delegated. The rules of master and servant, requiring the employer to furnish proper tools and a reasonably safe place to work are other instances of this non-delegable duty. The employer is liable if the duty is not performed, no matter in whose hands the job of satisfying legal requirements is put by him. The Iowa Court, in the case discussed, was quoting a form of the rule applied to employers of independent contractors where no affirmative duty was owed the particular plaintiff, but where responsibility is sometimes imposed despite that for acts done by the contractor resulting in another's injury. In a later (and the only other) decision, our Court shows a clear understanding of the nature of the liability of the owner of premises.

The responsibility of the lessor or vendor of property may be treated very briefly. After sale and when the premises are in possession of the purchaser, the former owner is not liable to one coming thereon for injuries through an open source of danger existing when the premises were sold. It is a general rule that a lessor is not liable to a lessee for open defects existing at the time of the lease. General responsibility of landlord to tenant is not within this discussion. One well considered case has discussed the question of the lessor's responsibility to those coming upon the premises on business with tenants where the lessor retains control of part of the property. Judge Deemer announced the general rule that the one who occupies the premises is alone liable, for he is bound to keep them in repair. There are, he said, three exceptions; (1) where the landlord retains control over the part of the premises where the accident takes place; (2) where he and the

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*See cases referred to in note 76 supra.

*MECHEM ON AGENCY, 2nd ed., §§ 1639-1641.

*The difficulty of this application of liability and the basis for it are clearly discussed in Dean E. R. Thayer's "Liability Without Fault", 29 Harv. L. Rev. 801, 808 et seq.

*Crambill v. Percival-Porter Co., 176 Iowa 733. The landlord of an apartment house retained control of halls and stairways. A contractor engaged in wiring the building took up a floorboard and failed to replace it and the tenant fell in the hole. Though the suit was brought against the agent of the property, the landlord's liability is also discussed.

*Upp v. Darner, 150 Iowa 403.

tenant are in joint control; (3) where the defect at the time of the lease constituted a nuisance. In the case itself there was found such reservation of control on the part of the landlord that a duty was owed to one who came on business to the part controlled by the lessor.88

Finally, there is the question of liability of a landowner to policeman, fireman and similar visitors. They often come for the benefit of the landowner, but they enter by public authority and not his permission. And often, too, they enter under circumstances that afford little opportunity for precautions to make the premises safe. There are no Iowa decisions. Authority generally has held that the landowner owes no affirmative duty to this class of visitors, apart from statute,89 but a late New York decision allowed a fireman to recover who fell into unguarded coal hole in a paved driveway on the defendant's property.90

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88Burner v. Higman etc. Co., 127 Iowa 580. A discussion of and authorities upon this point may be found in Shearman and Redfield on Negligence, 6th ed., § 708 et. seq., and a series of annotations in L. R. A. 1916 F 1123. See also the well stated decision by Stevens, J., in Wilks v. Snyder, 180 N. W. 290, which involved the landlord's liability to a guest of a tenant.

89See 30 L. R. A. (N. S.) 60 and L. R. A. 1916 B 792 for collections of cases.

90Meiers v. Fred Koch Brewery, 127 N. E. 491. The decision is commented upon in 30 Yale L. Jour. 93; 34 Harv. L. Rev. 87; and is made the basis of a discussion by Professor F. H. Bohlen, beginning in 69 U. of Pa. L. Rev. 142, January 1921.