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disparage the union so long as his words do not imply a threat of retaliation. He may express his opinion as to the benefits or lack of benefits to be obtained by the employees if they unionize, and he can probably make it known that he thinks that unionization might cause him to close down because of the increased costs, and that it might result in the adoption of a system of seniority, causing the discharge of new employees. In short, there is practically no limitation upon the topics upon which the employer may speak or write, so long as his expression contains no threat of reprisal or force or promise of benefit. All this presupposes, of course, that the employer's attitude and tone of voice while uttering these otherwise innocuous expressions, are not such as in themselves to be coercive.

Under no circumstances, however, can we forget that in many parts of the country the unions have made no deep inroads even today, and so the employer remains omnipotent so far as his employees are concerned. In such areas conditions are substantially those which caused the enactment of the Wagner Act, and which caused the Board to apply the term "coercion" rather freely. Wherever this is the case, the realization is unavoidable that the Board and the courts must remain ever alert to catch those subtle expressions of the employer which, by their tone or wording, imply that the employee had better be receptive, or else!

PAUL L. HERZOG,
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LIABILITY OF OCCUPIER OF LAND TO UNDISCOVERED TRESPASSER

One has often heard the saying that a man's home is his castle. In not many other fields of the law is this adage more vividly illustrated than in the field of the law of negligence wherein it appears that an occupier of land is not liable for injury to an undiscovered trespasser.

It is a settled rule of law, that, generally speaking, an occupier of land is not subject to liability for an injury to a trespasser of whose presence the occupier was unaware.[1] By entering upon the property of another without being invited to do so, the trespasser violates the right of the possessor of the land to exclusive possession and control.

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[1] Prondecka v. Turner Falls Power & E. Co., 241 Mass. 100, 134 N. E. 352 (1922); Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908); Panunzio v. State, 266 App. Div. 9, 41 N. Y. S. 2d 587 (3d Dep't 1943).

It necessarily follows that having violated the rights of another to the exclusive enjoyment of his property, the trespasser must be deemed to have assumed all the risks and dangers incident to his unlawful act of trespass. From this it may be inferred that the reason for the rule is not so much that the trespasser is a wrongdoer, but that the law gives greater recognition to the rights of a possessor of property. "The true explanation seems to be merely that, in a civilization based on private ownership, it is considered a socially desirable policy to allow a man to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right." [2]

It is axiomatic that any ordinary use of land by an owner is lawful, and therefore no person by unlawfully intruding upon the land of another, can by his own wrongful deed, change a lawful use of property into an unlawful act against him, a trespasser.[3] In the use of his land, the occupier may, indeed, even be guilty of negligence and still the undiscovered trespasser may not complain. In order for negligence to be actionable the actor must owe the injured party a duty, created either by contract or operation of law, and since the law, as we have seen, prefers the property interests of the landholder over the personal interests of the trespasser it is manifest that no duty arises to maintain the property in suitable condition or to conduct lawful operations on the property in such a manner as to insure freedom of the trespasser from bodily harm. In fact, the rule has even been extended to include an immunity from liability for gross negligence by the occupier of land.[4] But a word of caution is necessary here. Some courts have inferred that when the negligence was so gross as to show a complete disregard of others in the sense that the injury inflicted was probably wilful, then the occupier should be liable.[5] This note of caution is necessary because the rule of immunity does not extend to wilful or wanton injury Thus a possessor of land who intends to cause injury to another, even a trespasser, is guilty of actionable negligence. In this situation the occupier is under a positive duty to refrain from any such conduct whether he is on his own property or not, and if he acts otherwise, he does so at his peril.

Unless, however, there is wilful or wanton injury, the rule, in short, is that no liability occurs for there is no duty on the part of the occupier to insure freedom from bodily harm. This rule was succinctly stated by Mr. Chief Justice McSherry in the case of *West Virginia Central & P. R. R. v. State* [6] wherein the learned Chief Justice states, "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to

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[2] PROSSER, TORTS 611 (1941).
[3] Ehret v. Village of Scarsdale, 269 N. Y. 198, 199 N. E. 56 (1935).
[4] Khinoveck v. Boston & Maine R. R., 210 Mass. 170, 96 N. E. 52 (1911).
[5] Indianapolis Ry. v. McBrown, 46 Ind. 229 (1874); Lafayette R. R. v. Adams, 26 Ind. 76 (1866).
[6] 96 Md. 652, 54 Atl. 669 (1903).

the individual complaining, the observance of which would have averted or avoided the injury." [7]

This same rule of immunity has long been in existence in England [8] and, in fact, prevails to this day. In the recent case of *Adams v. Naylor* [9] decided by the Court of Kings Bench in 1944, an interesting application of the doctrine was made. In 1941, during the height of the Second World War, certain English military authorities entered onto a plot of land composed of sand dunes. On the tract the authorities laid an extensive minefield. It appears that in peace time the public had free access to this tract and, indeed, children had been accustomed to use it as a playground. The minefield was enclosed by a six-feet high barbed wire fence and notices of danger were posted. In August, 1942, three boys entered the minefield to recover a ball, one of them came into contact with a mine which exploded, and, as a result, one of the boys was killed and a second injured. The parents of the victims claimed that the defendant, the army officer in control of the field, was liable as the occupier of the land at that time. The defendant alleged as a defense, *inter alia,* that the boys were undiscovered trespassers.

The court held that the parents could not recover because the boys were trespassers on the land. Lord Justice MacKinnon, in the course of his opinion, stated: "When the boys got inside the enclosure I think they were clearly trespassers, and prima facie, a trespasser can have no claim against the owner or occupier of land for damages sustained by him from any dangerous thing on the land." [10]

This English decision is clearly in accord with the American authorities on the subject and, moreover, is extremely logical in its application of the rule, even though the army officer was only in temporary occupation of the minefield. Whether the possession is temporary or permanent, is immaterial. The same immunity is granted since, manifestly, temporary occupation can be just as exclusive as a permanent holding, and it therefore follows as a consequence that no duty to the trespasser arises in such a situation.

In considering the application of the above enunciated rule to specific factual situations, the courts have discussed two possible phases of the matter. The decisions have considered the duty of an occupier to put his land in a condition reasonably safe for those who choose to traverse it; and have also weighed the obligation of the occupier to refrain from negligently operating the premises so as to avoid injury to those choosing to trespass upon it.

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[7] 96 Md. 652, 666, 54 Atl. 669, 671 (1903). Chief Justice McSherry also said at page 667, "The duty owed to a trespasser on a right of way is measurably less than the duty owed to the same person when not a trespasser but when entirely off the right of way."

[8] Grand Trunk Ry. of Canada v. Barnett, [1911] A. C. 361; Lygo v. Newbold, 9 Ex. 302, 156 Eng. Rep. 130 (1854).

[9] [1944] 1 K. B. 750; *accord,* Addie & Sons, Ltd. v. Dimbreck, [1929] A. C. 358.

[10] [1944] 1 K. B. 750, 761.

In the first category, the courts have uniformly held that a trespasser enters at his own risk and takes the property just as he finds it, including any hidden or unexposed dangers, and that the occupier is not bound to maintain his property in first-class shape for the protection of trespassers. At first blush, this rule would seem to be elementary, but it must be remembered that the courts, for years, have struggled with the problem as to whether property interests or personal interests should prevail, and the solution of this problem is not as simple as it would seem. This will be evident, a little later on in this note, when the rights of infant trespassers are considered under the doctrine of attractive nuisances. The broken body of an infant is convincing testimony for social minded judges who have definitely veered from the property concept. Indeed, it has already been pointed out that the personal interest prevails where the occupier is guilty of wilful, wanton conduct. Moreover, it may be pointed out that the trespasser, although a wrongdoer, is not an outlaw and therefore some degree of care must be taken when his presence is discovered.

One of the leading cases to come before the courts on this phase of the subject is *Lary v. Cleveland R. R.*[11] In that case the plaintiff and a group of young people took refuge under the platform of a freight house of the defendant railroad during a rainstorm. The act of taking refuge was a pure intrusion on the part of the plaintiff and his group, there being no invitation by the railroad in any manner. It appears that part of the roof of the freight house was missing and during the course of the storm a further piece of the roof was torn off. The plaintiff became frightened and he ran out from under the roof, was struck by the piece of the roof and was injured. He sued the railroad for negligently failing to repair the roof. The court held that the defendant was not liable for the plaintiff's injuries being under no obligation to maintain the building in a safe condition. With respect to this obligation, the court said: "The appellant was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the appellee as to the condition of the grounds and buildings thus invaded without leave." [12]

Here then is a striking recognition of the doctrine of immunity granted to the property holder even though the premises are in a palpable state of disrepair. In spite of the fact that the defendant might have been negligent, even grossly negligent, in failing to repair its freight depot, the railroad was deemed to be free from liability.

It has been said that the trespasser, by entering upon the property wrongfully, accepts the risks incident to his unlawful act. Carrying this rule to its logical conclusion the possessor of land is not liable even where he maintains unguarded or unprotected openings, ele-

[11] 78 Ind. 323 (1881).
[12] 78 Ind. 323, 326 (1881).

vator shafts, pits or other conditions unsafe for ordinary passages and the trespasser falls into the dangerous openings and is injured.

Thus, it has been held that a trespasser who falls through an unprotected hole in a private bridge may not recover.[13] Likewise it has been held that a trespasser who fell down an unguarded elevator shaft, also, may not recover for the possessor's negligence in leaving the shaft in such a condition.[14] In the case of elevator shafts the decisions are not entirely harmonious, but a close inspection indicates that the decision usually turns on the question as to whether the individual was actually a trespasser, or a licensee, or even an invitee. Manifestly, a greater degree of care should be observed where the person injured is an invitee, because the entry and use of the premises are lawful and the occupier is under a duty to provide a safe means of passage or to give adequate notice of the unsafe condition.[15]

The rule prohibiting trespassers from recovering where the premises are maintained in an unsafe condition, is also applicable to the case of a licensee. A licensee is a person who is privileged to come upon the land by virtue of the possessor's consent. However, he comes on the land for his own purposes, not for any benefit to the occupier and therefore has no right to expect the premises to be put in safe condition for his reception. Indeed, the only thing that distinguishes a licensee from a trespasser is consent and it is for this reason that he is sometimes called a "bare" licensee. The rule of non-liability, therefore, is equally applicable to a licensee. In fact, the courts, when stating the rule applicable to a particular situation, usually point out that the licensee is considered in the same category as a trespasser.[16] In many cases the plaintiff is referred to as a licensee where in truth he is really a trespasser, but this is to put the plaintiff in as favorable a position as possible, so as to show the extent of the rule of immunity.[17] In England, however, the rule is different. There a licensee is entitled to a duty of "care and protection accordingly" [18] from the occupant of land.

In the second category, the courts consider the use of the premises by the occupier and the conduct of negligent operations in such use. For example, in the course of the occupier's business, he may place dangerous machinery or other contrivances on the land, and the question arises as to whether the occupier is liable to the trespasser if he is injured by the occupier's dangerous machinery. The courts

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[13] Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673 (1889); Gallagher v. Fordham & Loring Corp., 13 N. Y. S. 2d 322 (City Ct. 1939).

[14] Flanagan v. Sanders, 138 Mich. 253, 101 N. W. 581 (1904).

[15] *Cf.* Gotch v. K. & B. Packing & Provision Co., 25 P. 2d 719 (1933).

[16] 1 THOMPSON, NEGLIGENCE § 945 (1901).

[17] Fox v. Warner-Quinlan Asphalt Co., 204 N. Y. 240, 97 N. E. 497 (1912); Birch v. City of N. Y., 190 N. Y. 397, 83 N. E. 51 (1907); *cf.* Carbone v. Mackchil Realty Corp., 296 N. Y. 154, 158, 71 N. E. 2d 447, 448 (1947).

[18] Hardy v. Central Ry., [1920] 3 K. B. 459, 472, 473.

have uniformly answered this question in the negative. Thus, the liability of the occupier, or, more correctly, his nonliability, in this category is the same as that where the occupier maintains his premises in an unsafe condition. And this is a salutary rule, since, so long as the occupier does not interfere with the rights of the public, he has a perfect right to conduct on his premises any lawful business and he may use his property for any lawful purpose, although such use may entail an element of danger and possibility of injury to persons coming upon the property unlawfully. Therefore the occupier may place upon the property such buildings, machinery, rolling stock or other articles as may be necessary and convenient for his lawful use, and, even if the occupier is negligent in his operation of all of these things, he is immune from liability to the trespasser.

It is evident that in the use of highly dangerous machinery some possibility of harm may be anticipated if anyone comes in contact with it. Must the occupier of land anticipate the probability that trespassers will intrude upon his land, and, knowing the injurious character of his machinery, must he then take necessary steps to insure the trespasser's safety? It appears that, generally speaking, the occupier of private property may safely engage in ordinary work and conduct his operations in a customary manner without incurring liability therefor, even though danger may be anticipated because of the operations conducted, since the occupier is entitled to assume that ordinary individuals will obey the law.[19]

This also seems to be the rule in the English courts.[20]

The question of anticipation very frequently arises in cases where railroads are charged with injuring persons walking along the tracks, or in some other manner using the railroad's right of way. The majority of courts have felt that it would be imposing too great a burden to require the railroads to foresee a proposed trespass, and therefore hold that they are not under a duty to anticipate or look out for them. To hold otherwise would require a railroad to guard every mile of its tracks in order to forestall the possibility of intrusion by trespassers.[21]

New York is in accord with this majority rule. It has been said in a well considered New York case involving injuries to a trespasser by a railroad that "Primarily it was the engineer's duty to run his train on schedule time and guard the safety of the passengers. It was not his duty to watch for trespassers on the track. He had a right to assume that people would obey the law." [22]

A case which aptly illustrates the general rule with respect to railroads, is *Sheehan v. St. Paul & D. Ry.*[23] In that case, the plain-

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[19] Zartner v. George, 156 Wis. 131, 145 N. W. 971 (1914).
[20] Lowery v. Walker, [1911] A. C. 10.
[21] Hank v. Great Northern R. R., 131 Minn. 281, 154 N. W. 1088 (1915).
[22] Capitula v. New York Central R. R., 213 App. Div. 526, 528, 210 N. Y. Supp. 651, 653 (3d Dep't 1925).
[23] 76 Fed. 201 (C. C. A. 7th 1896).

tiff, while walking on defendant's tracks, caught his foot in an iron cattle guard, and, being unable to remove the foot before a locomotive, moving backward, came upon him, was struck by the train which severed his foot. The court held, Judge Seaman writing the opinion, that the defendant was not liable as the plaintiff was a trespasser upon the defendant's property. With respect to the matter of anticipating the intrusion, the court said, "Is it, however, bound to foresee or assume that rational beings will thus enter as trespassers in a place of danger, and to exercise in the running of its trains the constant vigilance in view of the probability which is imposed for public crossings? . . . The more reasonable doctrine is pronounced, in effect, as follows: That the railroad company has the right to a free track in such places; that it is not bound to any act or service in anticipation of trespassers thereon; and that the trespasser who ventures to enter upon a track for any purpose of his own assumes all risks of the conditions which may be found there, including the operation of engines and cars." [24]

Thus an examination of the decisions reveals that, with respect to negligent operations conducted on private property, the rule of immunity granted by the law to the occupier is again predicated upon a lack of duty owing to the intruder. And it is submitted that sociological considerations should not be permitted to outweigh cold logical reasoning in this connection. To allow recoveries to trespassers in these situations would require business and manufacturing establishments to exercise eternal vigilance to avoid injuries which they did not initiate. The law should not compel businessmen to shut down their gates and stop their businesses for the protection of wrongdoers.[25]

It has already been noted that, if an occupier of land is guilty of wilful, wanton injury, he is liable for damages even to a trespasser.[26] In addition to this qualification to the general rule as heretofore stated, it must be pointed out that a few courts have taken the minority view and have allowed recoveries to trespassers where the occupier himself was negligent.[27] But this further qualification appears to be based upon a novel refinement between active and passive negligence. It is said that if the occupier negligently sets in motion any destructive agency or force the natural tendency of which would be to injure an individual, even a trespasser, then the occupier is liable.[28] The principle has been stated by the North Carolina Su-

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[24] 76 Fed. 201, 204 (C. C. A. 7th 1896).

[25] *Cf.* Buch v. Amory Manufacturing Co., 69 N. H. 257, 262, 44 Atl. 809, 811 (1898).

[26] See note 5 *supra.*

[27] Lovett v. Salem & So. D. R. R., 9 Allen 557 (Mass. 1865); Norris v. Litchfield, 35 N. H. 271 (1857); Kerwhacker v. Cleveland, C. & C. R. R., 3 Ohio St. 172 (1854).

[28] *See* Rome Furnace Co. v. Patterson, 120 Ga. 521, 523, 48 S. E. 166, 167 (1904).

preme Court, as follows: "The rule established by the authorities in this and other jurisdictions is that, while the owner of the premises is not liable to a trespasser, bare or permissive licensee . . . unless the injury results from the wilful and wanton negligence of the owner, yet this rule is usually restricted to injuries resulting from existent conditions upon the premises, or what is termed passive negligence. Upon the other hand, the owner is liable for any injuries brought about and caused by active negligence in the management or operation of the business or control of the premises which would increase the hazard to the licensee or trespasser." [29]

Thus, it will be seen that in some jurisdictions a recovery may be had by a trespasser, even where there is no wilful or wanton conduct on the part of the landholder. But the difficulty in applying such a rule is in determining an exact and workable distinction between active and passive negligence.

In New York, and in the majority of the states, the liability for active negligence is confined to the case of a licensee and is categorically denied in the case of a trespasser.[30]

It is interesting to note that the Restatement of the Law of Torts [31] supports the general proposition to the effect that a possessor of land is not subject to liability for bodily harm caused to trespassers. The Restatement, likewise, separates the rule into two separate phases, namely, a failure to exercise reasonable care to put the land in a condition reasonably safe for a trespasser's reception, or a failure to carry on activities so as not to endanger trespassers. The Restatement, likewise, recognizes the limitation to the rule in the case of wilful or wanton injury.[32]

The scope of this note is confined to cases of undiscovered trespassers. It may be stated, however, that an exception to the general rule of immunity, is a case where the occupier discovers the peril of the trespasser. In such a situation, a duty arises on the part of the occupier to make all reasonable efforts to avert injury to the trespasser. Where the presence of the trespasser becomes known, the occupier is put on notice and he must then act as a reasonably prudent man in order to avoid unnecessary injury. But it may be said that this duty to avert injuries is negative in character, since, as we have seen, the possessor of land is not liable for his mere omissions with regard to the conditions of the premises.[33]

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[29] Brigman v. Fiske-Carter Construction Co., 192 N. C. 791, 796, 136 S. E. 125, 128 (1926); *accord,* Southcote v. Stanley, 1 H. & N. 248, 156 Eng. Rep. 1196 (Ex. 1856). See also the excellent annotations on this subject in 49 A. L. R. 778 and 156 A. L. R. 1226.

[30] Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908); Zaia v. Lalex Realty Corp., 261 App. Div. 843, 25 N. Y. S. 2d 183 (2d Dep't 1941); Rosenthal v. New York, S. & W. R. R., 112 App. Div. 431, 98 N. Y. Supp. 476 (1st Dep't 1906).

[31] RESTATEMENT, TORTS § 333 (1934).

[32] *Id.* comment d.

[33] *Cf.* Preston v. Austin, 206 Mich. 194, 172 N. W. 377 (1919); Union

In a discussion of the exceptions to the rule, the thought comes to mind as to whether infant trespassers are to be considered in a more favorable position than a person endowed with sufficient reason to understand the nature of his act. An examination of the decisions reveals that, on this phase of the subject, much controversy on the part of the courts exists. To begin with, practically all courts, with unanimity, hold that generally speaking an infant is entitled to no greater rights than an adult and that no recovery may be had.[34] But a qualification has crept into the law in many jurisdictions where the occupier has failed to take proper precautions to prevent injuries to children by contrivances, machines or conditions on the land, which the occupier, as a prudent individual, should have known would naturally attract or allure them into unsuspected danger. This qualification is known as the attractive nuisance doctrine, or the doctrine of the turntable cases. It is this qualification that has caused a great conflict in opinion in the several states. Manifestly, judges entertaining social-minded concepts would seize upon this doctrine wherever possible to break away from the long settled rule of immunity granted to property owners. The doctrine itself has been a part of the law for many years, having originated in an English case decided in 1841.[35] In the United States the leading case on the subject is *Sioux City R. R. v. Stout*[36] where a young child was injured playing on a railroad turntable. It is from this case that the doctrine in the United States derives its name, the "turntable" doctrine.

In New York the doctrine has not been accepted. The leading New York case is *Walsh v. The Fitchburg R. R.*[37] which was also a case involving injuries received from a railroad turntable. There it was held that the possessor of land was not liable to an infant trespasser and the allurement of the turntables to children could not be considered an implied invitation to enter upon the property. In a recent New York case the Court of Appeals reaffirmed the rule laid down in the *Walsh* case and stated once again that the doctrine of attractive nuisances does not apply in New York.[38]

But some New York courts, recognizing the harshness of the holdings and the need for some amelioration, have sought to distin-

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News Co. v. Freeborn, 111 Ohio St. 105, 144 N. E. 595 (1924); Zartner v. George, 156 Wis. 131, 145 N. W. 971 (1914).

[34] Carbone v. Mackchil Realty Corp., 296 N. Y. 154, 71 N. E. 2d 447 (1947); Mendelowitz v. Neisner, 258 N. Y. 181, 179 N. E. 378 (1932); Zaia v. Lalex Realty Corp., 261 App. Div. 843, 25 N. Y. S. 2d 183 (2d Dep't 1941).

[35] Lynch v. Nurdin, 1 Q. B. 29, 133 Eng. Rep. 1041 (1841).

[36] 17 Wall. 657, 21 L. ed. 745 (U. S. 1873).

[37] 145 N. Y. 301, 39 N. E. 1068 (1895). In Tierney v. New York Dugan Bros., 288 N. Y. 16, 41 N. E. 2d 161 (1942), a recovery was allowed where a child was injured on one of the defendant's trucks on the public highway. The decision was based on the fact that the vehicle was a dangerous attraction on the public highway, not on private property, and the *Walsh v. Fitchburg R. R.* case was thus distinguished.

[38] Morse v. Buffalo Tank Corp., 280 N. Y. 110, 19 N. E. 2d 981 (1939).

guish the doctrine and have struggled to discover some means of liability.[39] For example, the Appellate Division, Third Department, in a case decided in June, 1946,[40] granted a recovery in an action for the death of a six-year-old girl who had fallen down an elevator shaft while playing upon the defendant's property. The court held in that case that the rule of nonliability for attractive nuisances, as laid down in the *Walsh* case, should not be rigidly applied. The court felt that, under the peculiar facts present, the defendant was liable. In the course of its opinion the court made the interesting observation that: "The doctrine as to nonliability for injury caused by 'attractive nuisance' had for its foundation the necessities of industry and enterprise, and also perhaps the preservation of a freedom for one to do as he pleases with his own on his own." [41] Apparently the court felt that the basis for the rule had, under modern conditions, ceased to exist.

This case was followed by a very recent case which came before the Court of Appeals in January, 1947.[42] Incidentally, the case came up on an appeal from the Appellate Division, Third Department, which, as we have noted, adopted an extremely liberal viewpoint. In that case, three young boys were injured when one of the walls of an abandoned foundation collapsed. The plaintiffs contended that the site of the foundation was more of an allurement to children than the turntable in the *Walsh* case, and that the defendant had notice that children were seen at play on the site. The court held, however, that the infants were, at best, bare licensees and that the general rule of nonliability towards trespassers and licensees applied.

Briefly considering, then, the results of all of the authorities on the general question of liability to a trespasser, we find that, from a historical standpoint, the New York courts have consistently adhered to the property concept and have concluded that the rights of the property owner are entitled to greater protection than the personal interests of the trespasser. The New York courts have even stood firm in the cases of infant trespassers where sympathetic tendencies of liberal-minded judges are more apt to be evident. But, as we have seen, under the present state of the law, a note of dissension has arisen among a few New York judges who seem to feel that the preservation of personal interests is the predominant factor, and the fundamental basis for giving greater protection to the interest of the property owner no longer exists. *Cessante ratione legis cessat et ipsa lex,* say these judges, at least with respect to young, helpless, children.

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[39] "Those states which still hold out against the doctrine are willing, in extreme cases, to find some excuse for liability." PROSSER, TORTS 620 (1941).

[40] Clifton v. Patroon Operating Corp., 271 App. Div. 122, 63 N. Y. S. 2d 597 (3d Dep't 1946).

[41] 271 App. Div. 122, 129, 63 N. Y. S. 2d 597, 602 (3d Dep't 1946).

[42] Carbone v. Mackchil Realty Corp., 296 N. Y. 154, 71 N. E. 2d 447 (1947).

Perhaps the day is not too distant when, certainly, in considering the doctrine of attractive nuisances, New York will join the ranks of those progressive states which subordinate the protection of property interests to personal interests, where serious bodily harm ensues. It is true that with the humane side of the matter the law cannot be concerned, but, in view of transmuted concepts as a result of societal evolution, the law may validly create a legal duty where it otherwise did not exist. Only in this way can the complete body of the Law of Torts, in New York, become "a living manifestation of the institutions of a changing political and economic culture."

HAROLD E. COLLINS.

RES IPSA LOQUITUR AND EXPLODING BOTTLES

The rule of *res ipsa loquitur* [1] has been a source of confusion in many of our modern courts, causing many and diverse definitions of its meaning and purpose.[2] As a result we find that different jurisdictions vary widely in their application of the rule, although it would be safe to say that the rule is now applied in one form or another in every state of the Union. There was a time, though, when the rule was not looked upon quite so favorably and the courts were reluctant to apply it.[3]

Perhaps the best and most oft-quoted definition of the rule was that offered by Chief Justice Erle in 1865: [4] "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident was from want of care." Thus, when an accident occurs under the foregoing rule, an inference,[5] and in some jurisdictions a

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[1] Literally, "the thing itself speaks."

[2] "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions." Bond, C.J., dissenting in Potomac Edison Co. v. Johnson, 160 Md. 33, 152 Atl. 633 (1930).

[3] "If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw in Ballard v. North British R. Co., Sess. Cas., H. L. 43 (1923).

[4] Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865).

[5] Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 355 (1947); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504