DUTIES OWED TRESPASSERS, LICENSEES, AND INVITEES, IN IOWA

Since man ceased to be a nomad, his legal systems have tended to favor protection of rights concerning land. At first, an intruder on land was dealt with harshly. But the law must always strike a balance, and in this instance a balance between the rights of the intruder and those of the owner or occupier. Surveying the present posture of the Iowa law in this area, this article considers the definitions of trespasser, licensee, and invitee and the duties owed by an owner or occupier to each.[1]

I. WHO ARE "TRESPASSERS", "LICENSEES", "INVITEES?"

Who is a trespasser? *Mann v. Des Moines Railway*[2] defined a trespasser as one, not rightfully upon the land or property of another, who has entered without consent or invitation, express or implied, of the owner or occupier of the land. One who intentionally and without privilege enters another's land is a trespasser.[3] Not only may a person trespass on the land of another but stock or animals may also trespass.[4] The repeated or continued nature of the trespass will not in and of itself change the trespasser into a mere licensee;[5] there must be knowledge of the continued use and some form of acquiescence thereto or consent to the use by the owner or occupier. When the owner or occupier knows of the use, he may place signs or barriers in the path of the trespassers in order to prevent an implication that he has consented or acquiesced to the trespasser's continued use.[6]

Who is a licensee? The Iowa court has recognized three kinds of licensees, a licensee by acquiescence, a licensee by implied invitation, and a licensee by express invitation. *Wilson v. Goodrich*[7] defines a licensee as one who goes upon the property of another either at the invitation or with the implied acquiescence of the owner or occupant for a purpose purely personal to the licensee. The licensee is like the trespasser in that he is on the premises for a reason personal to the licensee and not for the purpose or benefit of the owner or occupier or licensor.[8]

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[1] This subject matter continues to be of significance, as shown in the recent cases of Denison v. Wiese (Iowa #49964, opinion filed May 3, 1960), and Reasoner v. Chicago, R.I. & P. R.R., 101 N.W.2d 739 (Iowa 1960).

[2] 232 Iowa 1049, 7 N.W.2d 45 (1942).

[3] 42A WORDS AND PHRASES 107 (1952).

[4] Reynolds v. Chicago, G.W.R.R., 159 Iowa 317, 140 N.W. 825 (1913); Rutherford v. Iowa Cent. Ry., 142 Iowa 744, 121 N.W. 703 (1909); Foster v. Bussey, 132 Iowa 640, 109 N.W. 1105 (1906); Titus v. Chicago, M. & St. P. Ry., 128 Iowa 194, 103 N.W. 343 (1905); Dailey v. Chicago, M. & St. P. Ry., 121 Iowa 254, 96 N.W. 778 (1903).

[5] Battin v. Cornwall, 218 Iowa 42, 253 N.W. 842 (1934); Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904).

[6] Pulley v. Chicago, B. & Q. Ry., 94 Iowa 565, 63 N.W. 328 (1895).

[7] 218 Iowa 462, 252 N.W. 142 (1934).

[8] Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944) (owner in-

A licensee by acquiescence, sometimes called a mere licensee, or a bare licensee, enters upon the land or proprty of another without objection, *i.e.* by mere permission, sufference or acquiescence of the owner or occupier. The term licensee is sometimes loosely and incorrectly used to mean the bare licensee who is there without express or implied invitation.[9] The acquiescence by the landowner necessary to make one a bare licensee may be implied when the owner or occupier knows of the continued use of his land by the bare licensee and fails to object.[10] It is difficult to determine just when a court will imply acquiescence and remove the intruder from the status of a trespasser. There must be something from which consent may be inferred, which must be more than mere use.[11] Any implication of acquiescence may be rebutted by the showing of other facts.[12] The owner or occupier may withdraw his consent or acquiescence and thereby withdraw the bare license by substantially obstructing the path.[13] Where the bare license has been withdrawn or suspended, as by substantial

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vited customer to leave coat in shop; minority of Court would overrule McMullen v. M. & M. Hotel Co., 227 Iowa 1061, 290 N.W. 3 [1940], by holding plaintiff not to be licensee as a matter of law); Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Rodefer v. Turner, 232 Iowa 691, 6 N.W.2d 17 (1942) (plaintiff sued alleging *res ipsa loquitur*); Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934) (ventured outside scope of invitation); Printy v. Reimbold, 200 Iowa 541, 202 N.W. 122 (1925); Davis v. Malvern L. & P. Co., 186 Iowa 884, 173 N.W. 262 (1919) (bare licensee, acquiescence); Calwell v. Minneapolis & St. L. R.R., 138 Iowa 32, 115 N.W. 605 (1908) (bare licensee called implied licensee); Croft v. Chicago, R.I. & P. Ry., 132 Iowa 687, 108 N.W. 1053 (1907); Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa 622, 109 N.W. 177 (1906).

[9] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942).

[10] Tarashonsky v. Illinois Cent. R.R., 139 Iowa 709, 117 N.W. 1074 (1908); Calwell v. Minneapolis & St. L.R.R., 138 Iowa 32, 115 N.W. 605 (1908) (well-defined footpath across defendant's tracks); Croft v. Chicago, R.I. & P. Ry., 132 Iowa 687, 108 N.W. 1053 (1907) (use is tolerated); Booth v. Union Terminal Ry., 126 Iowa 8, 101 N.W. 147 (1904) (defendant was aware of the use and offered no objection or obstruction); Thomas v. Chicago, M. & St. P. Ry., 103 Iowa 649, 72 N.W. 783 (1897), *previous decision* in 93 Iowa 248, 61 N.W. 967 (1895); Clampit v. Chicago, St. P. & K.C. Ry., 84 Iowa 71, 50 N.W. 673 (1891); Murphy v. Chicago, R.I. & P.R.R., 38 Iowa 539 (1874); Evans v. Burlington & M.R.R.R., 21 Iowa 374 (1866) (cattle); Donaldson v. Mississippi & M.R.R., 18 Iowa 280 (1865).

[11] Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904); Burg v. Chicago, R.I. & P. Ry., 90 Iowa 106, 57 N.W. 680 (1894); Masser v. Chicago, R.I. & P. Ry., 68 Iowa 602, 27 N.W. 776 (1886).

[12] Radenhausen v. Chicago, R.I. & P. Ry., 205 Iowa 547, 218 N.W. 316 (1928) (substantially obstructing the path); Papich v. Chicago, M. & St. P. Ry., 183 Iowa 601, 167 N.W. 686 (1918) (overruled on other grounds by Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 [1942]); Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904) (where railway provided space for teams and pedestrians, person at any other place than that provided was trespasser); Mears v. Chicago & N.W. Ry., 103 Iowa 203, 72 N.W. 509 (1897) (fence); Pulley v. Chicago, B. & Q. Ry., 94 Iowa 565, 63 N.W. 328 (1895) (signs).

[13] Radenhausen v. Chicago, R.I. & P. Ry., 205 Iowa 547, 218 N.W. 316 (1928); Papich v. Chicago, M. & St. P. Ry., 183 Iowa 601, 167 N.W. 686 (1918), overruled on other grounds in Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904).

obstruction of a path, the landowner or occupier will not be liable for injuries sustained by one attempting to cross the obstruction who had previously been a bare licensee.[14]

Licensees by express or implied invitation are considered together because there is no difference in the duty owed to them. A licensee by express invitation is one who is rightfully upon the land because he has been directly invited to enter upon the land.[15] A licensee by implied invitation is one who has been invited to enter upon the land either by some affirmative act done by the owner or occupier or by the appearances of the land which justify persons generally in believing that the owner or occupier has given his consent to the public generally to enter upon or cross over his premises. The licensee must stay within the scope of the implied invitation.[16] The Iowa cases say that children who come within the attractive nuisance doctrine are licensees by implied invitation.[17]

Who is an invitee? An invitee is one who goes to a place of business either by express or by implied invitation on business of mutual interest to both or in connection with some business of the owner or occupier,[18] whereas the licensee goes on the property for his own sole benefit and purpose.[19] Thus the first problem is the nature of the business or the purpose upon which the invitee enters, since that is what distinguishes him from a licensee. Some courts require the invitee's purpose to be pecuniary in nature or of economic benefit to the possessor. Other courts do not require that the invitee's purpose for entering be of a pecuniary nature or of economic benefit to the possessor. They require that the invitee's reason for entering be one for which it may be implied that the owner or occupier has exercised due care to make the land safe for the reception of an invitee with that purpose. The courts which follow this liberal view are more likely to find that the injured party was an invitee.[20] Iowa does not follow this liberal view.

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[14] Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904).

[15] Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953); Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942).

[16] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa 622, 109 N.W. 177 (1906).

[17] Wilmes v. Chicago, G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916); Note, *Attractive Nuisance in Iowa*, 1 DRAKE L. REV. 68 (1952).

[18] Holmes v. Gross, 93 N.W.2d 714 (Iowa 1958).

[19] Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944) (jury question); Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Rodefer v. Turner, 232 Iowa 691, 6 N.W.2d 17 (1942); Low v. Ford Hopkins Co., 231 Iowa 251, 1 N.W.2d 95 (1941); Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934); Nelson v. F. W. Woolworth & Co., 211 Iowa 592, 231 N.W. 665 (1930); Printy v. Reimbold, 200 Iowa 541, 202 N.W. 122 (1925); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Downing v. Merchant's Nat. Bank, 192 Iowa 1250, 184 N.W. 722 (1922); Wilmes v. Chicago, G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916); Burk v. Walsh & Oltrogge, 118 Iowa 397, 92 N.W. 65 (1902).

[20] PROSSER, TORTS § 78 (2d ed. 1955).

The Iowa Court in *Atherton v. Hoerig's Grocery* [21] said that the owner or occupier of a business impliedly invites people to enter for the purpose of buying goods offered for sale and when a person comes upon the premises for that purpose he is an invitee. In *Low v. Ford Hopkins Company*[22] the Court said the person entering the store must be a prospective customer, that is, to look for or inspect merchandise with the thought of a possible purchase, otherwise he is not impliedly invited to enter and is a mere licensee. There may be a problem where the one injured is merely accompanying the invitee. For instance, suppose *A*, who had no intent to buy came into a store accompanying *B*, who was intending to buy. Would *A* be a "licensee" or an "invitee"? *A* might be *B's* child, fiance, friend, spouse, or parent. There have been several cases on this in other jurisdictions but none in Iowa.[23] The invitee's purpose may be a question for the jury.[24] The invitee's purpose for entering is to be determined by his outward acts rather than his subjective intent.[25]

The implied invitation to enter includes an invitation to a patron to return to the premises to get that which he left behind when he was a customer.[26] The receiver of an express invitation to come upon the premises is an invitee regardless of whether the visit will directly benefit the invitor.[27]

Even though it may be decided that the invitee came upon the premises for the purpose of the owner or occupier, he may cease to be an invitee and become a mere licensee if he goes on a venture of his own.[28] The owner or occupier's duty to an invitee does not extend to a place not intended for reception of visitors or where they are not intended nor expected to go.[29] *Holmes v.*

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[21] 249 Iowa 50, 86 N.W.2d 252 (1957).

[22] 231 Iowa 251, 1 N.W.2d 95 (1941).

[23] 65 C.J.S. *Negligence* § 43(4) (1950).

[24] Low v. Ford Hopkins Co., 231 Iowa 251, 1 N.W.2d 95 (1941).

[25] Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922).

[26] Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944). The author of the *Sulhoff* opinion attempted to overrule McMullen v. M. & M. Hotel Co., 227 Iowa 1061, 290 N.W. 3 (1940), by holding that the question of whether the plaintiff was an invitee was for the jury. Two judges concurred in the entire opinion, but five other judges joined in a special concurring opinion, written by the author of the *McMullen* opinion, which disagreed on this point. *Query*, would the patron have had to make a purchase the first time he was on the premises? See Flatley v. Acme Garage, 196 Iowa 82, 194 N.W. 180 (1923).

[27] Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944).

[28] Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934); Nelson v. F. W. Woolworth & Co., 211 Iowa 592, 231 N.W. 665 (1930); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Oaks v. Chicago, R.I. & P. Ry., 174 Iowa 648, 156 N.W. 740 (1916); Adams v. Chicago G.W.R.R., 156 Iowa 31, 135 N.W. 21 (1912) (misconduct).

[29] Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934); Nelson v. F. W. Woolworth & Co., 211 Iowa 592, 231 N.W. 665 (1930); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); McNaughton v. Illinois Cent. Ry., 136 Iowa 177, 113 N.W. 844 (1907). *Query*, is the *McNaughton* case overruled by Holmes v. Gross, 93 N.W.2d 714 (Iowa 1958)? *Cf.* Burk v. Walsh & Oltrogge, 118 Iowa 397, 92 N.W. 65 (1902) (a customer in a store for purpose of purchasing goods is there

Gross[30] may be said to stand for the proposition that the area of invitation includes those areas which are so arranged as to lead the invitee to reasonably believe that they were open to him.

II. WHAT DUTIES ARE OWED TO "TRESPASSERS", "LICENSEES", "INVITEES?"

What duties are owed to trespassers? Once it is determined that the plaintiff is a trespasser, the next question to consider is under what circumstances there will be liability for the trespasser's injuries. There would be no liability at all if the court followed two early common law ideas: that an invasion of the close could neither be justified nor excused; and that the landowner within the boundaries of his own land has infinite dominion and right to do anything he pleases. But since the courts rely upon the social compact theory, *sic utere tuo ut aleinum non laedas* [it is the duty of a person to use his property so as not to injure unnecessarily the property or person of another] our society demands that no one person be free to exercise his rights in derogation of another's.[31] Thus the landowner or occupier must have some duty to the trespasser even though the trespasser is a wrongdoer by virtue of his trespassing.

A court faced with this question usually starts with the basic proposition that one is not bound to foresee that others will break the law. Therefore, the problem is divided into two aspects, that is, what duty is owed to the unknown, unseen, undiscovered trespasser and what to the seen or known or discovered trespasser?

In Iowa there is no duty to anticipate that people will trespass on one's land[32] or to watch for the presence of trespassers even though they trespass so frequently on the land that warning signs have been placed.[33] However, there is some Iowa authority which may stand for the point that the trespasser's presence is to be anticipated and one's conduct must be governed accordingly, when the public is accustomed to crossing the premises, the owner or occupier can reasonably be charged with knowledge of that fact, and the activity carried on by him involves a high degree of danger to the trespasser.[34] Many courts disagree with this as

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by implied invitation and is entitled to protection regardless of whether he comes upon the premises in an authorized manner or not).

[30] 93 N.W.2d 714 (Iowa 1958) (defendant obtained directed verdict, which was reversed on ground there was jury question whether plaintiff was still an invitee, when he was injured on his way to what he thought was a restroom).

[31] Wilmes v. Chicago, G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916).

[32] Pulley v. Chicago, B. & Q. Ry., 94 Iowa 565, 63 N.W. 328 (1895); Thomas v. Chicago, M. & St. P. Ry., 93 Iowa 248, 6 N.W. 967 (1895), *subsequent decision* in 103 Iowa 649, 72 N.W. 783 (1897); Masser v. Chicago, R.I. & P. Ry., 68 Iowa 602, 27 N.W. 776 (1886); McAllister v. Burlington & N.W.R.R., 64 Iowa 395, 20 N.W. 488 (1884).

[33] Pulley v. Chicago, B. & Q. Ry., 94 Iowa 565, 63 N.W. 328 (1895).

[34] Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa 622, 109 N.W. 177 (1906); Ambroz v. Cedar Rapids Elec. L. & P. Co., 131 Iowa 336, 108 N.W. 540 (1906).

basis for liability[35] and there are even many Iowa cases which say that there is no duty to the trespasser until his presence is actually known.[36] This basic immunity from liability for injuries to the undiscovered trespasser applies despite the condition of the premises and the conduct or acts of the owner or occupier upon his own premises.

The owner or occupier owes the trespasser no duty to put the premises in a safe condition.[37] However, the immunity from liability for the condition of the premises does not allow a person to create a dangerous condition for the purpose of harming the trespasser.[38] Moreover, not only have courts limited liability to the unknown trespasser for the condition of the premises, but also immunity from liability for conduct or acts upon the premises, by holding that the owner or occupier may not wantonly or willfully injure the undiscovered trespasser.[39] It should be noted that this immunity belongs only to the owner or occupier of the premises on which the injury occurred and a defendant who injures another may not take advantage of the fact that the party he injured was a trespasser,[40] licensee, or invitee[41] on a third person's land.

Once the trespasser's presence becomes known to the owner or occupier, he may eject the trespasser.[42] But he may not use more force than is reasonably necessary to do so nor in any way unnecessarily endanger the trespasser.[43] The mere fact that

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[35] PROSSER, TORTS § 76 (2d ed. 1955).

[36] Strum v. Tri-City Ry., 190 Iowa 387, 178 N.W. 525 (1920); Trotter v. Chicago, R.I. & P. Ry., 185 Iowa 1045, 171 N.W. 572 (1919); Wilmes v. Chicago, G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916) (attractive nuisance); Mabbott v. Illinois Cent. R.R., 116 Iowa 490, 89 N.W. 1076 (1902) (mail carrier); Thomas v. Chicago, M. & St. P. Ry., 114 Iowa 169, 86 N.W. 259 (1901); Earl v. Chicago, R.I. & P. Ry., 109 Iowa 14, 79 N.W. 381 (1899); Mears v. Chicago & N.W. Ry., 103 Iowa 203, 72 N.W. 509 (1897); Baker v. Chicago, R.I. & P. Ry., 95 Iowa 163, 63 N.W. 667 (1895); O'Keefe v. Chicago, R.I. & P.R.R., 32 Iowa 467 (1871).

[37] Battin v. Cornwall, 218 Iowa 42, 253 N.W. 842 (1934); Reese v. Kenyon Co., 198 Iowa 1015, 200 N.W. 600 (1924); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911); Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896 (1908); Burner v. Higman & Skinner Co., 127 Iowa 580, 103 N.W. 802 (1905); Flaherty v. Nieman, 125 Iowa 546, 101 N.W. 280 (1904).

[38] Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896 (1908); Schmid v. Humphrey, 48 Iowa 652 (1878) (dogs); Hooker v. Miller, 37 Iowa 613 (1873) (spring gun); Yates v. Squires, 19 Iowa 26 (1865) (servant).

[39] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942).

[40] Cox v. Des Moines Elec. Light Co., 209 Iowa 931, 229 N.W. 244 (1930).

[41] Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954).

[42] Stone v. Chicago & N.W. Ry., 47 Iowa 82 (1877) (passenger who refuses to pay fare becomes trespasser).

[43] Johnson v. Chicago, St. P., M. & O. Ry., 123 Iowa 224, 98 N.W. 642 (1904) (jury question); Johnson v. Chicago, St. P., M. & O. Ry., 116 Iowa 639, 88 N.W. 811 (1902) (directed verdict for defendant reversed and new trial ordered); Trezona v. Chicago G.W. Ry., 107 Iowa 22, 77 N.W. 486 (1898); Ramm v. Minneapolis & St. P. Ry., 94 Iowa 296, 62 N.W 751 (1895); Curl v. Chicago, R.I. & P. Ry., 63 Iowa 417, 19 N.W. 308 (1884); Johnson v. Chicago, R.I. & P. Ry., 58 Iowa 348, 12 N.W.

one is a trespasser does not absolve the owner or occupier of his liability for his intentional torts upon the trespasser.

When the presence of the trespasser becomes known there is also the question whether the owner or occupier will be liable for his negligent acts which caused injury to a trespasser. The Iowa Court has taken several different views on this point. The first test was that when the landowner or occupier knows of the presence of the trespasser he must not injure the trespasser by an intentional wrong or by wanton or reckless misconduct.[44] Even though the Court at times continued to follow the first test it developed a second by saying that the duty of the landowner is not to expose the known trespasser to unreasonable or unnecessary dangers nor to negligence which has a special reference to the trespasser.[45] Then a refinement of the first test was adopted that the landowner owes the known trespasser no duty except that of not injuring him by willful or wanton conduct.[46] In *Gregory v. Wabash Railroad Company*[47] the Court said that liability is not based upon the willful and wanton test, but upon a failure to exercise the highest possible degree of care under the circumstances to avoid the accident after the trespasser's peril is discovered. The Court went on to intimate that this meant a failure to exercise the care a reasonably prudent person would under like circumstances. Several cases say that the owner or occupier must use reasonable care to prevent injury to the trespasser after the trespasser's presence on the premises becomes actually known.[48] The Court by dicta in *Mann v. Des Moines Railway*[49]

329 (1882); Benton v. Chicago, R.I. & P. Ry., 55 Iowa 496, 8 N.W. 330 (1881); Hoffbauer v. Delhi & N.W. Ry., 52 Iowa 342, 3 N.W. 121 (1897); Schmid v. Humphrey, 48 Iowa 652 (1878).

[44] Gwyn v. Duffield, 66 Iowa 708, 24 N.W. 523 (1885); O'Keefe v. Chicago, R.I. & P.R.R., 32 Iowa 467 (1871).

[45] Johnson v. Chicago, St. P., M. & O. Ry., 123 Iowa 224, 98 N.W. 642 (1904); McAllister v. Burlington & N.W.R.R., 64 Iowa 395, 20 N.W. 488 (1884); Benton v. Chicago, R.I. & P. Ry., 55 Iowa 496, 8 N.W. 330 (1881).

[46] The following cases are overruled, either specifically or by implication, as to this proposition, by Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942): Masteller v. Chicago, R.I. & P. Ry., 192 Iowa 465, 185 N.W. 107 (1921); Trotter v. Chicago, R.I. & P. Ry., 185 Iowa 1045, 171 N.W. 572 (1919) (no duty to trespasser arises until he is actually seen in position of peril, and the extent of the duty then is not to injure him wantonly or wilfully, and is to do everything that can be reasonably done to avoid injuring him); Papich v. Chicago, M. & St. P. Ry., 183 Iowa 601, 167 N.W. 686 (1918) (the only case *specifically* overruled); Earl v. Chicago, R.I. & P. Ry., 109 Iowa 14, 79 N.W. 381 (1899); Gwyn v. Duffield, 66 Iowa 708, 24 N.W. 523 (1885); O'Keefe v. Chicago, R.I. & P. Ry., 32 Iowa 467 (1871).

[47] 126 Iowa 230, 101 N.W. 761 (1904).

[48] Davis v. Malvern L. & P. Co., 186 Iowa 884, 173 N.W. 262 (1919); Trotter v. Chicago, R.I. & P. Ry., 185 Iowa 1045, 171 N.W. 572 (1919); Reynolds v. Chicago, G.W.R.R., 159 Iowa 317, 140 N.W. 825 (1913) (stock trespassing); Graham v. Chicago & N.W. Ry., 131 Iowa 741, 107 N.W. 595 (1906) (reasonable promptness); Purcell v. Chicago & N.W. Ry., 109 Iowa 628, 80 N.W. 682 (1899); Neet v. Burlington, C.R. & N. Ry., 106 Iowa 248, 76 N.W. 677 (1898); Mears v. Chicago & N.W. Ry., 103 Iowa 203, 72 N.W. 509 (1897); Sutzin v. Chicago, M. & St. P. Ry., 95 Iowa 304, 63 N.W. 709 (1895).

[49] 232 Iowa 1049, 7 N.W.2d 45 (1942). See also Reasoner v. Chicago, R.I. & P. Ry., 101 N.W.2d 739 (Iowa 1960).

finally laid the problem to rest and followed the majority view by saying that the owner or occupier's duty is to use such reasonable and ordinary care as the circumstances demand after the trespasser's presence on the premises and his peril become known to avoid injuring him. The willful and wanton test of *Papich v. Chicago, Milwaukee and St. Paul Railway*[50] and other cases was expressly repudiated.

The landowner or occupier owes no affirmative duty to act in order to prevent injury to a trespasser until he has actual knowledge of the trespasser's peril.[51] This view may be affected by the Iowa doctrine of last clear chance: that is, the defendant is liable not only where he knew of the danger but also where he *should have known* of the danger.[52] Once the presence and the peril of the trespasser becomes known to the landowner he need only take such affirmative action as a reasonably prudent man would to prevent injuring the trespasser.[53]

The trespasser may be precluded from recovery for his injury by his contributory negligence.[54] The landowner or occupier is justified in presuming that the trespasser will exercise due care.[55]

What duties are owed to the bare licensee? Under what circumstances will there be liability to the licensee by acquiescence, for injuries which have occurred either because of the condition of the premises or because of acts or omissions of the owner or

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[50] 183 Iowa 601, 167 N.W. 686 (1918). See also cases cited in note 12, *supra*.

[51] Dufree v. Wabash R.R., 155 Iowa 544, 136 N.W. 695 (1912) (deaf trespasser); Myers v. Chicago, B. & Q. R.R., 152 Iowa 330, 131 N.W. 770 (1911); Rutherford v. Iowa Cent. Ry., 142 Iowa 744, 121 N.W. 703 (1909); Graham v. Chicago & N.W. Ry., 131 Iowa 741, 107 N.W. 595 (1906); Clemans v. Chicago, R.I. & P. Ry., 128 Iowa 394, 104 N.W. 431 (1905); Farrell v. Chicago, R.I. & P. Ry., 123 Iowa 690, 99 N.W. 578 (1904) (question whether owner or occupier saw trespasser in time to avoid injuring him is for jury); Johnson v. Chicago, M. & St. P. Ry., 122 Iowa 556, 98 N.W. 312 (1904); Mears v. Chicago & N.W. Ry., 103 Iowa 203, 72 N.W. 509 (1897) (trespassing stock); O'Keefe v. Chicago, R.I. & P. Ry., 32 Iowa 467 (1871).

[52] *Cf.* Orr v. Cedar Rapids & M.C. Ry., 94 Iowa 423, 62 N.W. 851 (1895).

[53] Graham v. Chicago & N.W. Ry., 143 Iowa 604, 122 N.W. 573 (1909) (failure to stop train); Rutherford v. Iowa Cent. Ry., 142 Iowa 744, 121 N.W. 703 (1909) (failure to give signal); Doggett v. Chicago, B. & Q. Ry., 134 Iowa 690, 112 N.W. 171 (1907) (no affirmative duty); Graham v. Chicago & N.W. Ry., 131 Iowa 741. 107 N.W. 595 (1906).

[54] Reasoner v. Chicago, R.I. & P. Ry., 101 N.W.2d 739 (Iowa 1960); Dufree v. Wabash R.R., 155 Iowa 544, 136 N.W. 695 (1912) (as matter of law); Myers v. Chicago, B. & Q. R.R., 152 Iowa 330, 131 N.W. 770 (1911) (question for jury); Anderson v. Ft. Dodge, D.M. & S.R.R., 150 Iowa 465, 130 N.W. 391 (1911); Ambroz v. Cedar Rapids Elec. L. & P. Co., 131 Iowa 336, 108 N.W. 540 (1906) (jury question); Fink v. Des Moines, 115 Iowa 641, 89 N.W. 28 (1902) (four-year-old trespasser held too young to be contributorily negligent); Baker v. Chicago, R.I. & P. Ry., 95 Iowa 163, 63 N.W. 667 (1895) (contributorily negligent as matter of law, where failure to keep look-out for train); Pulley v. Chicago B. & Q. Ry., 94 Iowa 565, 63 N.W. 328 (1895); Buelow v. Chicago, St. P. & K.C. Ry., 92 Iowa 240, 60 N.W. 617 (1894); Patterson v. Burlington & M.R.R.R., 38 Iowa 279 (1874); Carlin v. Chicago, R.I. & P.R.R., 37 Iowa 316 (1873).

[55] Rutherford v. Iowa Cent. Ry., 142 Iowa 744, 121 N.W. 703 (1909).

occupier regardless of the condition of the premises? It should be noted, in this context, that if the licensee has left the area of consent and has ventured to a place where he is neither expected nor invited to be, he is no longer a licensee but is classified as a trespasser and the owner or occupant is not liable for injuries caused by the condition of the premises.[56] But what if the status of "bare licensee" has not been altered in that manner?

The owner or occupant will not be liable for his negligence which results in injury to an unknown bare licensee because of the condition of the premises. A bare license to use the property of another for the sole purpose and benefit of the licensee imposes no obligation to keep the premises in a safe condition for the unknown bare licensee.[57] The owner or occupant is liable, however, if he permits a bare licensee to enter a part of premises where there are traps or pitfalls or other hidden dangers which cause the bare licensee's injury.[58]

After the presence of the bare licensee becomes known, there is a question whether there will be liability to the bare licensee for the owner's or occupier's negligent conduct which in itself causes injury or which in connection with the condition of the

[56] Knote v. Des Moines, 204 Iowa 948, 216 N.W. 52 (1927) (plaintiff fell in a manhole); Wagner v. Chicago & N.W. Ry., 122 Iowa 360, 98 N.W. 141 (1904).

[57] Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953) (window washer injured; court held tenant and landlord had joint control over outside of building); Leonard v. Mel Foster Co., 244 Iowa 1319, 60 N.W.2d 532 (1953) (plaintiff fell into unguarded trench); Central Nat. Bank v. Lederer Strauss & Co., 236 Iowa 16, 17 N.W.2d 817 (1945) (the property owner does not owe to a mere licensee the duty of exercising ordinary case regarding apparatus on his premises; plaintiff was injured on fire escape); Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Rodefer v. Turner, 232 Iowa 691, 6 N.W.2d 17 (1942) (elevator shaft); Battin v. Cornwall, 218 Iowa 42, 253 N.W. 842 (1934); Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934); Sanburn v. Rollins Hosiery Mills, 217 Iowa 218, 251 N.W. 144 (1933) (plaintiff's clothes caught in machinery); Printy v. Reimbold, 200 Iowa 541, 202 N.W. 122 (1925) (an *invitation* will also be implied from such long acquiescence as reasonably to give rise to the inference that it is intended, but it is not ordinarily to be inferred from mere passive acquiescence in what would otherwise be a trespass); Flatley v. Acme Garage, 196 Iowa 82, 194 N.W. 180 (1923) (first time plaintiff entered she was social invitee, but when she left and returned, she was mere licensee); Davis v. Malvern L. & P. Co., 186 Iowa 884, 173 N.W. 262 (1919); Wendt v. Town of Akron, 161 Iowa 338, 142 N.W. 1024 (1913) (plaintiff became more than mere licensee, until such permission was revoked, but Court uses the test for the duty to a mere licensee); Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896 (1908) (licensee takes land as he finds it); Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa 622, 109 N.W. 177 (1906) (light wire over defendant's premises); Burner v. Higman & Skinner Co., 127 Iowa 580, 103 N.W. 802 (1905) (elevator shaft); Flaherty v. Nieman, 125 Iowa 546, 101 N.W. 280 (1904) (bare licensee assumes risk of dangers in existence or inherent in the property entered); O'Donnell v. Chicago, M. & St. P. Ry., 69 Iowa 102, 28 N.W. 464 (1886).

[58] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Wendt v. Town of Akron, 161 Iowa 338, 142 N.W. 1024 (1913); Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa 622, 109 N.W. 177 (1906) (electric wires); Ambroz v. Cedar Rapids Elec. L. & P. Co., 131 Iowa 336, 108 N.W. 540 (1906).

premises causes injury to the bare licensee. Here again, as in the case of known trespassers, the Iowa Court has taken several views; they are as follows. One test for liability used was that the owner or occupier must not be actively negligent after he knows of the presence of the bare licensee.[59] In *Croft v. Chicago, Rock Island and Pacific Railway*[60] the Court defined active negligence as doing unexpectedly a thing wholly unusual or unexpectedly doing a usual thing in an unusual manner. The other test is that the owner or occupier is only liable for willful or wanton conduct resulting in injury to the bare licensee even if the bare licensee's presence is known.[61] Although *Mann v. Des Moines Railway*[62] did not expressly rule on these cases, it is interesting to note that when a trespasser who has no consent to be upon the land is discovered, he has the right that the landowner or occupier not be negligent toward him, while a mere licensee who has implied consent or acquiescence to come on the land and is discovered only has the right that the landowner not willfully or wantonly injure him. In *Adams v. Chicago Great Western Railroad*[63] the Court said that the owner or occupier may not intentionally imperil the life or limb of the bare licensee. The owner or occupier may be liable for the use of excessive force to expel a bare licensee by express or implied invitation.[64]

What duties are owed to the licensee by express or implied invitation? The owner or occupier is not an insurer of those who come upon his land by express or implied invitation,[65] but he owes

[59] Croft v. Chicago, R.I. & P. Ry., 132 Iowa 687, 108 N.W. 1053 (1907); Ambroz v. Cedar Rapids Elec. L. & P. Co., 131 Iowa 336, 108 N.W. 540 (1906); Scott v. St. Louis, K. & N.W. Ry., 112 Iowa 54, 83 N.W. 818 (1900) (brakeman told plaintiff to go through trains which blocked his path; train started and injured plaintiff); Reifsnyder v. Chicago, M. & St. P. Ry., 90 Iowa 76, 57 N.W. 692 (1894) (defendant's employees made a flying switch).

[60] 132 Iowa 687, 108 N.W. 1053 (1907).

[61] Leonard v. Mel Foster Co., 244 Iowa 1319, 60 N.W.2d 532 (1953); Central Nat. Bank v. Lederer Strauss & Co., 236 Iowa 16, 17 N.W.2d 817 (1945); Rodefer v. Turner, 232 Iowa 691, 6 N.W.2d 17 (1942); McMullen v. M. & M. Hotel Co., 227 Iowa 1061, 290 N.W. 3 (1940) (held licensee as matter of law; minority in Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 [1944], would overrule this); Sanburn v. Rollins Hosiery Mills, 217 Iowa 218, 251 N.W. 144 (1933); Printy v. Reimbold, 200 Iowa 541, 202 N.W. 122 (1925); Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896 (1908).

[62] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942).

[63] 156 Iowa 31, 135 N.W. 21 (1912) (conductor was justified in ejecting plaintiff, not only on ground of intoxication, but also because of refusal to pay his fare).

[64] Adams v. Chicago G.W.R.R., 156 Iowa 31, 135 N.W. 21 (1912); Weymire v. Wolfe, 52 Iowa 533, 3 N.W. 541 (1879).

[65] Anderson v. Younker Bros. Inc., 249 Iowa 923, 89 N.W.2d 858 (1958) (handrails); Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1957) (ingress and egress); Shreve v. Edmundson Art Foundation, 243 Iowa 237, 50 N.W.2d 26 (1952) (waxed floor); Parsons v. H.L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943) (snow storm); Nelson v. Smeltzer, 221 Iowa 972, 265 N.W. 924 (1936) (waxed floors); Nelson v. F. W. Woolworth & Co., 211 Iowa 592, 231 N.W. 665 (1930) (customer fell down open stairway).

the duty of exercising due care to prevent injury.[66] This includes an active, affirmative duty to use reasonable ordinary care so as not unreasonably or unnecessarily to expose the licensee by express or implied invitation to danger.[67] The owner or occupier owes this duty irrespective of his own convenience.[68] The Court in *Reynolds v. Skelly Oil Company*[69] said that the duty to make the premises reasonably safe meant safe according to the usage and habits and ordinary risks of the business. The owner or occupier has the duty to give warning of any latent or concealed perils, hidden defects, traps, snares, pitfalls, etc., which are not known to the licensee by direct or implied invitation and would not be observed by him in the exercise of due care.[70]

A person need not exert extraordinary care to prevent injuries to the licensee by express or implied invitation from conditions of the premises which are temporary in character and produced by an agency over which the owner or occupier has no control. He need only exercise ordinary and reasonable care in order to avoid

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[66] Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942).

[67] Holmes v. Gross, 93 N.W.2d 714 (Iowa 1958) (restroom); Leonard v. Mel Foster Co., 244 Iowa 1319, 60 N.W.2d 532 (1953); Reuter v. Iowa Trust & Sav. Bank, 244 Iowa 939, 57 N.W.2d 225 (1953) (snow storm); Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953) (window washer); Shreve v. Edmundson Art Foundation, 243 Iowa 237, 50 N.W.2d 26 (1952) (waxed floors); Primus v. Bellevue Apartments, 241 Iowa 1055, 44 N.W.2d 347 (1950); Jackson v. Chicago, M., St. P. & P.R.R., 238 Iowa 1253, 30 N.W.2d 97 (1947) (plaintiff unloading goods from railway car); Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944) (washroom); LaSell v. Tri-States Theatre Corp., 233 Iowa 929, 11 N.W.2d 36 (1943) (movie goer fell off step inside theatre); Mann v. Des Moines Ry., 232 Iowa 1049, 7 N.W.2d 45 (1942); Reynolds v. Skelly Oil Co., 227 Iowa 163, 287 N.W. 823 (1939); Osborn v. Klaber Bros., 227 Iowa 105, 287 N.W. 252 (1939) (waxed floors); Riggs v. Pan American Wall Paper & Paint Co., 225 Iowa 1051, 283 N.W. 250 (1939); Nelson v. Smeltzer, 221 Iowa 972, 265 N.W. 924 (1936) (waxed floors); Pomerantz v. Pennsylvania Dixie Cement Corp., 214 Iowa 1002, 243 N.W. 283 (1932); Nelson v. F. W. Woolworth & Co., 211 Iowa 592, 231 N.W. 665 (1930) (open stairway behind counter); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Loveless v. Town of Wilton, 193 Iowa 1323, 188 N.W. 874 (1922) (employee of independent contractor); Graham v. Ochsner, 193 Iowa 1196, 188 N.W. 838 (1922) (elevator shaft); Noyes v. Des Moines Club, 178 Iowa 815, 160 N.W. 215 (1916) (elevator shaft); Whitman v. Chicago, G.W. Ry., 171 Iowa 277, 153 N.W. 1023 (1915); Snipps v. Minneapolis & St. L. Ry., 164 Iowa 530, 146 N.W. 468 (1914); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911) (barb wire fence); Gardner v. Waterloo Cream Separator Co., 134 Iowa 6, 111 N.W. 316 (1907) (elevator shaft); Connolly v. Des Moines Inv. Co., 130 Iowa 633, 105 N.W. 400 (1906); Young v. People's Gas & Elec. Co., 128 Iowa 290, 103 N.W. 788 (1905) (mail carrier); Williams v. Mineral City Park Ass'n, 128 Iowa 32, 102 N.W. 783 (1905) (plaintiff injured by band member throwing beer bottle); Burner v. Higman & Skinner Co., 127 Iowa 580, 103 N.W. 802 (1905); Wilsey v. Jewett Bros., 122 Iowa 315, 98 N.W. 114 (1904) (elevator); Gilbert v. Hoffman, 66 Iowa 205, 23 N.W. 632 (1885) (Hotelkeeper impliedly invited plaintiff into quarantined hotel); McDonald v. Chicago & N.W.R.R., 26 Iowa 124 (1868).

[68] Whitman v. Chicago, G.W. Ry., 171 Iowa 277, 153 N.W. 1023 (1915).

[69] 227 Iowa 163, 287 N.W. 823 (1939).

[70] Shreve v. Edmundson Art Foundation, 243 Iowa 237, 50 N.W.2d 26 (1952) (waxed floor not hidden danger); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922).

injuring those who are expressly or impliedly invited on the premises.[71] The owner or occupier is under a duty to exercise ordinary care to discover unsafe conditions upon his premises.[72] Liability for the condition of the premises is imposed on the one who controls the premises.[73] The license is revoked by the sale of the land by the licensor.[74]

The owner or occupier has the right to presume that the licensee will use due care[75] and if he fails to do so the licensee may be contributorily negligent.[76]

What duties are owed to invitees? The owner or occupier of land is not an insurer of those who come upon the land by express or implied invitation.[77] He owes a duty to exercise reasonable care to keep the premises in a reasonably safe condition.[78] Only reasonable precautions must be taken.[79] Since the invitor is not an insurer of the invitee's safety, the measure of the invitor's duty to the invitee for the condition of the premises is reasonable or ordinary care considering the use and purposes for which the property is primarily intended.[80] The invitor's duty to keep the premises reasonably safe applys only to hidden dangers, traps, snares, pitfalls, etc., which are not known to the invitee and would not be observed by him in the exercise of due care.[81]

The invitee assumes all normal, obvious and ordinary risks attendant to the use of the premises and the owner or occupier is under no duty to reconstruct or alter the premises so as to

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[71] Parsons v. H. L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943).

[72] Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953); Gowing v. Henry Field Co., 225 Iowa 729, 281 N.W. 281 (1939); Steele v. Grahl-Peterson Co., 135 Iowa 418, 109 N.W. 882 (1907); Connolly v. Des Moines Inv. Co., 130 Iowa 633, 105 N.W. 400 (1906); see text supported by and cases cited in notes 85-88, *infra*.

[73] Cabrnosh v. Penick & Ford, Ltd., 218 Iowa 972, 252 N.W. 88 (1934) (patron who deposited refuse in city dump at city's invitation held not liable to other persons on premises); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911) (defendant conveyed land to another before the injury).

[74] Fischer and Knorr v. Johnson Lane & Co., 106 Iowa 181, 76 N.W. 658 (1898).

[75] Fishburn v. Burlington & N. Ry., 127 Iowa 483, 103 N.W. 481 (1905) (licensee must exercise due care not to injure other people rightfully on the land); Oliver v. Iowa Cent. Ry., 122 Iowa 217, 97 N.W. 1072 (1904); Beem v. Tama & T. Elec. Ry. & Light Co., 104 Iowa 563, 73 N.W. 1045 (1898); Burg v. Chicago, R.I. & P. Ry., 90 Iowa 106, 57 N.W. 680 (1894); *cf.* Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954).

[76] Orr v. Cedar Rapids & M.C. Ry., 94 Iowa 423, 62 N.W. 851 (1895) (jury question); Lang v. Holiday Creek R.R., 42 Iowa 677 (1876).

[77] See note 65, *supra*.

[78] See note 67, *supra*.

[79] McGrean v. Bos Freight Lines, 240 Iowa 318, 36 N.W.2d 374 (1949) (not every conceivable danger or forseeable danger, but only probable danger); Parsons v. H. L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943); Nelson v. Smeltzer, 221 Iowa 972, 265 N.W. 924 (1936).

[80] Nelson v. Smeltzer, 221 Iowa 972, 265 N.W. 924 (1936).

[81] Anderson v. Younker Bros. Inc., 249 Iowa 923, 89 N.W.2d 858 (1958); Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1957); Shreve v. Edmundson Art Foundation, 243 Iowa 237, 50 N.W.2d 26 (1952); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Downing v. Merchant's Nat. Bank, 192 Iowa 1250, 184 N.W. 722 (1922); Trainer v. H. A. Maine & Co., 184 Iowa 549, 168 N.W.

remove known and obvious danger.[82] The owner's or occupier's duty to the invitee for the condition of the premises includes the means of ingress and egress thereto.[83] The owner or occupier may avoid liability for the condition of the premises either by making his land safe or by giving warning to the invitee of the hidden danger.[84]

The owner or occupier must exercise reasonable care to discover any unsafe condition on his premises. This duty applies not only to those defects of which he is aware but also to those which he could have discovered by exercising due care.[85] However, before he will be liable, he must have had sufficient time to remedy the dangerous condition after his receipt of actual knowledge or after the time when he became charged with constructive notice.[86] Liability for negligence in failing to render premises reasonably safe for an invitee may be predicated upon the owner's or the occupier's superior knowledge concerning the dangers of the premises to the person going thereon.[87] When the dangerous instrumentality

872 (1918) (independent contractor); McNaughton v. Illinois Cent. Ry., 136 Iowa 177, 113 N.W. 844 (1907). *Query*, is the *McNaughton* case overruled by Holmes v. Gross, 93 N.W.2d 714 (Iowa 1958)? Primus v. Bellevue Apartments, 241 Iowa 1055, 44 N.W.2d 347 (1950), appears to be contra to these cases, saying that such duty would apply to open and obvious and pre-existing defects, as well as to hidden defects.

[82] Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1957); Gowing v. Henry Field Co., 225 Iowa 729, 281 N.W. 281 (1939).

[83] Anderson v. Younker Bros. Inc., 249 Iowa 923, 89 N.W.2d 858 (1958); Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1957); Reuter v. Iowa Trust & Sav. Bank, 244 Iowa 939, 57 N.W.2d 225 (1953); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922); Downing v. Merchant's Nat. Bank, 192 Iowa 1250, 184 N.W. 722 (1922); Burk v. Walsh & Oltrogge, 118 Iowa 397, 92 N.W. 65 (1902) (plaintiff entered through rear door and walked into elevator shaft; Court said, where one enters for an authorized purpose, and is entitled to protection, it is immaterial whether he comes upon the premises in an authorized manner or not).

[84] Anderson v. Younker Bros. Inc., 249 Iowa 923, 89 N.W.2d 858 (1958); Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1957); Parsons v. H. L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943).

[85] Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953); Gowing v. Henry Field Co., 225 Iowa 729, 281 N.W. 281 (1939); Steele v. Grahl-Peterson Co., 135 Iowa 411, 109 N.W. 882 (1907); Connolly v. Des Moines Inv. Co., 130 Iowa 633, 105 N.W. 400 (1906).

[86] Parsons v. H. L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943); Snipps v. Minneapolis & St. L.R.R., 164 Iowa 530, 146 N.W. 468 (1914).

In Denison v. Wiese (Iowa #49964, opinion filed May 3, 1960), the defendant tavern operator was sued for injuries sustained by plaintiff, a business invitee, who fell off a bar stool. Defendant moved for a directed verdict and for judgment notwithstanding the verdict, on the grounds that he did not have actual or constructive notice of a latent or concealed defect in the condition of his premises. Defendant appealed from adverse rulings on these motions. The Court held there was sufficient evidence to sustain a jury finding that defendant knew or should have known of the condition of the "wobbly bar stool" which caused plaintiff's injury and that, in the exercise of due diligence for the welfare of his invitees, he was charged with knowledge that the bar stool had become unsafe in ample time to have had it repaired prior to the accident.

[87] Atherton v. Hoenig's Grocery, 249 Iowa 50, 86 N.W.2d 252 (1958); Hicks v. Goodman, 248 Iowa 1184, 85 N.W.2d 6 (1957); Reuter v. Iowa Trust & Sav. Bank, 244 Iowa 939, 57 N.W.2d 225 (1953); McGrean v.

is actually known to the owner or occupier and is not known to the invitee, there naturally is a duty to foresee the accompanying danger.[88] As in the case of licensees, including bare licensees, and trespassers, liability to the invitee is based upon the power to control the premises.[89]

An invitee must exercise reasonable care for his own safety, and may be contributorily negligent.[90] However, an invitee is not contributorily negligent in assuming that the premises are reasonably safe for his use until he has knowledge to the contrary.[91] The owner or occupier is required to exercise due care in affirmative acts not only after the invitee's presence is known, but also if in the exercise of due care his presence could have been discoverd.[92]

CONCLUSION

The Court, in drawing the lines between who is a trespasser, a bare licensee, a licensee by express or implied invitation and an invitee, has used both the purposes for which the intruder came and the owner or occupier's consent or lack of consent to the visit. In dealing with the problem of the duty of the landowner or occupier to the trespasser, licensee or invitee it has followed three basic ideas. First, the owner or occupier should not be liable for the injuries to one who is on his land when he does not know

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Bos Freight Lines, 240 Iowa 318, 36 N.W.2d 374 (1949); Stafford v. Gowing, 236 Iowa 171, 18 N.W.2d 156 (1945); Webber v. E. K. Larimer Hardware Co., 234 Iowa 1381, 15 N.W.2d 286 (1944); Parsons v. H. L. Green Co., 233 Iowa 648, 10 N.W.2d 40 (1943).

[88] McGrean v. Bos Freight Lines, 240 Iowa 318, 36 N.W.2d 374 (1949).

[89] Constantine v. Scheidel, 249 Iowa 953, 90 N.W.2d 10 (1958); Reuter v. Iowa Trust & Sav. Bank, 244 Iowa 939, 57 N.W.2d 225 (1953); Stupka v. Scheidel, 244 Iowa 442, 56 N.W.2d 874 (1953); Jackson v. Chicago, M. St. P. & P. Ry., 238 Iowa 1253, 30 N.W.2d 97 (1947); Hull v. Bishop-Stoddard Cafeteria, 238 Iowa 650, 26 N.W.2d 429 (1947); Cabrnosh v. Penick & Ford, Ltd., 218 Iowa 972, 252 N.W. 88 (1934); Noyes v. Des Moines Club, 178 Iowa 815, 160 N.W. 215 (1916); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911); Burner v. Higman & Skinner Co., 127 Iowa 580, 103 N.W. 802 (1905).

[90] Holmes v. Gross, 93 N.W.2d 714 (Iowa 1958) (dissenting opinion); Jensen v. St. Joseph's Mercy Hosp., 248 Iowa 960, 83 N.W.2d 403 (1957); Hammer v. Liberty Banking Co., 220 Iowa 229, 260 N.W. 720 (1935) (proceeded into darkness without caution); Oaks v. Chicago, R.I. & P. Ry., 174 Iowa 648, 156 N.W. 740 (1916); Christiansen v. Illinois Cent. Ry., 140 Iowa 345, 118 N.W. 387 (1908); McNaughton v. Illinois Cent. Ry., 136 Iowa 177, 113 N.W. 844 (1907); Beem v. Tama & T. Elec. Ry. & Light Co., 104 Iowa 563, 73 N.W. 1045 (1898).

[91] Jackson v. Chicago, M., St. P. & P. Ry., 238 Iowa 1253, 30 N.W.2d 97 (1947); Stafford v. Gowing, 236 Iowa 171, 18 N.W.2d 156 (1945); McNaughton v. Illinois Cent. Ry., 136 Iowa 177, 113 N.W. 844 (1907) (persons invited upon premises may assume that reasonable precautions have been taken for their protection and need not be on the lookout for negligence of the owner or occupier; however, the invitee must still exercise due care on his own); Gardner v. Waterloo Cream Separator Co., 134 Iowa 6, 111 N.W. 316 (1907); Gilbert v. Hoffman, 66 Iowa 205, 23 N.W. 632 (1885).

[92] Loveless v. Town of Wilton, 193 Iowa 1323, 188 N.W. 874 (1922); Christiansen v. Illinois Cent. Ry., 140 Iowa 345, 118 N.W. 387 (1908); Carver v. Minneapolis & St. L. Ry., 120 Iowa 346, 94 N.W. 862 (1903); Watson v. Wabash, St. L. & P. Ry., 66 Iowa 164, 23 N.W. 380 (1995); Weymire v. Wolfs, 52 Iowa 533, 3 N.W. 541 (1879).

of the intruder's presence. Second, when the owner or occupier gives his consent to the entrance of other people upon his land, he may place any terms or conditions he wishes upon that consent. Third, one should not be allowed to invite another into a place which is likely to cause injury to the person so invited.

RICHARD E. RAMSAY (June 1961)

ENFORCEMENT OF RESTRICTIVE COVENANTS IN IOWA

The United States is in the midst of a great population expansion. New additions and subdivisions are being platted as the cities expand to meet the housing needs created by the increased population. Many of these subdivisions are "restricted additions", the developers inserting restrictive covenants in the deeds to lots in these additions to make their purchase more attractive.

Today the cities are caught in the trap of "urban blight" as many people move to the new subdivisions and the older neighborhoods are encroached upon by commercial development and multiple dwelling use. Many of these old established neighborhoods came into existence as platted subdivisions, and the lots were conveyed with restrictive covenants upon them. These may no longer serve the purpose for which they were intended, or may stand to shield the area from engulfment.

In either new area or old, restrictive covenants limiting the use of land primarily in the form of building restrictions, are of increasing importance today. This article is undertaken in an attempt to analyze from past decisions what the Iowa Court's position is in enforcing restrictive covenants on real estate. It attempts to interpret what the court feels a restrictive covenant is, how it is created, how it should be interpreted, what the defenses against its enforcement are, and how it should be enforced.

I. THEORY OF RESTRICTIVE COVENANTS

The Iowa Court has adopted a theory which treats a restrictive covenant "as creating an equitable property interest in the burdened land, and as an appurtenance to the benefited land."[1] Most frequently these equitable servitudes are created by restrictive covenants placed by subdividers in deeds conveying lots in a restricted subdivision as a part of a general plan for the protection of the subdivision.[2] It is not necessary that the same restrictions

[1] Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956).

[2] Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956); 2 DEVLIN, REAL ESTATE § 990e (3d. ed. 1911).

be placed in all deeds so long as the plan of creating a uniform subdivision is apparent.[3] The Iowa Court has held that there is no distinction between restrictions which are a part of a general plan and personal transaction cases in which the use of one or more lots is restricted for the benefit of one or more lots.[4] Although these deeds are usually signed only by the grantor, the acceptance of the deed by the grantee binds him as much as if he had signed as well.[5] The end purpose of restrictive covenants relating to building restrictions is the protection of property values so as to increase the desirability of the benefited land.

If the restrictive covenant touches and concerns the land, and tends necessarily to enhance the land's value or render it more beneficial to the owner for the use contemplated, it is a covenant running with the land.[6] Where prior conveyances in the chain of title show restrictive covenants, subsequent grantees are bound by them if they have notice, though the covenants are omitted from their deeds.[7] Constructive notice as provided by the recording acts is sufficient notice,[8] or it is sufficient notice if the tract is a publicly and notoriously platted restricted area.[9] One who takes land with notice, actual or constructive, of a restriction upon it, will not in equity be permitted to violate the terms of the restriction. This is the doctrine of equitable notice described in *Tulk v. Moxhay*,[10] and adopted by the Iowa Court in *Thodos v. Shirk*.[11]

When restrictive covenants as to the purposes for which land may be used are created by placing them in deeds conveying lots in a subdivision, these restrictions extend to the benefit of all the grantees, and each grantee may, in equity, enforce these restrictions against all the other grantees.[12] The restrictions may have formed a part of the inducement to each purchaser, and he may have paid more because of their benefit. The buyer is willing to submit to a burden upon his land because a like burden is imposed on his neighbor's lot. The covenant or agreement between the grantor and grantee is therefore mutual as it forms a part of the original consideration.[13] A breach of the restrictive covenants

[3] Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956); Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956).
[4] Baker v. Smith, 242 Iowa 606, 47 N.W.2d 810 (1951).
[5] Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956).
[6] *Ibid.*; Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); Peden v. Chicago, R.I. & P. Ry, 73 Iowa 328, 35 N.W. 424 (1887).
[7] Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932); Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925).
[8] Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956); Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956).
[9] Shuler v. Independent Sand & Gravel Co., 203 Iowa 134, 209 N.W. 731 (1927).
[10] 2 Phil. 774, 41 Eng. Rep. 1143 (1848).
[11] 248 Iowa 172, 79 N.W.2d 733 (1956).
[12] Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956); Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925); Iowa Improvement Co. v. Aetna Explosives Co., 186 Iowa 1186, 165 N.W. 408 (1917); 2 DEVLIN, REAL ESTATE § 990e (3d ed. 1911); Annot., 89 A.L.R. 812 (1934).
[13] Annot., 21 A.L.R. 1281 (1922).