[HIGH COURT OF AUSTRALIA.]

LIPMAN . . . . . PLAINTIFF;

AND

CLENDINNEN . . . . . DEFENDANT.

H. C. OF A. 1932.

MELBOURNE, *June* 29, 30; *July* 21.

Dixon J.

Negligence—Owner of premises—Unguarded lightwell—Flats—Caretaker occupying portion of premises—Visitor to caretaker falling down lightwell at night—Licensee—Concealed trap—Damages—Liability of Owner.

The plaintiff at night fell into an unguarded lightwell adjoining a path or ramp leading to a door forming an access to the caretaker of the defendant's flats. The plaintiff was unaware of the lightwell and had received no warning. The caretaker occupied rooms in the flats for which she paid. The purpose of the plaintiff's visit was to ask her to do some domestic work by the day elsewhere. The lightwell was plainly visible in daylight; but in darkness, owing to its unusual character, position and construction, it amounted to a danger of a kind which a visitor who had not been warned would not reasonably anticipate.

Held, by *Dixon* J., (1) that the plaintiff came neither as a trespasser nor as an invitee but as a licensee; (2) that the obligation of the defendant as occupier of the premises towards such a visitor as the plaintiff was to take reasonable care to prevent harm to her from a state or condition of the premises known to the defendant but unknown to the visitor, which the use of reasonable care on the visitor's part would not disclose and which, considering the nature of the premises, the occasion of the leave and licence and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect; (3) that the facts (a) that the injured person was brought upon the premises by a tenant of rooms therein (the caretaker) who took them with an access in the condition complained of, (b) that the danger existed in the premises when the implied licence was given by the defendant as occupier for the entry of such persons as the plaintiff, (c) that the danger was not hidden, except by darkness, were all circumstances which must be considered in determining whether the occupier has omitted to use the care to which the licensee was entitled, but none of them was in itself decisive of that question;

(4) that the condition of the place constituted a hidden danger from which it was the duty of the defendant to exercise reasonable care to safeguard a licensee such as the plaintiff; (5) that the defendant had failed in that duty and the plaintiff, who was not guilty of contributory negligence, was entitled to recover damages for her injuries.

Liability of occupiers of premises to persons entering upon such premises considered.

TRIAL of action.

An action was brought by Esther Lipman, of North East Road, Walkerville, South Australia, against Charlotte Elizabeth Clendinnen, of Williams Road, Hawksburn, Victoria, who, as trustee, was the owner of a building in Robe Street, St. Kilda. The plaintiff's claim was for damages for personal injuries caused to her by falling into an unguarded lightwell upon the premises last mentioned.

The facts and arguments are fully stated in the judgment hereunder.

Hargrave, for the plaintiff.

Russell Martin, for the defendant.

Cur. adv. vult.

DIXON J. delivered the following written judgment:— July 21.

In this action the plaintiff, a resident of South Australia, seeks to recover from the defendant, a resident of Victoria, damages for personal injuries caused by falling into an unguarded lightwell upon the premises of the defendant. The defendant, as trustee, is the owner of a building in Robe Street, St. Kilda. It consists of two storeys constructed in flats, and stands back about seventeen feet from the roadway. The steps to the flats are in the centre and are approached by a cement path upon each side of which is a grass plot. Across the grass to the right of one entering are three or four brick squares forming stepping-stones leading to the north-western corner of the building from the path where it nears the steps. At that corner the house next door stands a little less than six feet away. In the adjoining side wall of this house is a long narrow

H. C. OF A. 1932.

LIPMAN v. CLENDINNEN.

Dixon J.

window the bottom of which is much below the ground level. Light is admitted to this window by a pit or well about five or six feet deep and two feet five inches wide, extending from the alignment of the defendant's building back for about twenty-two feet. Between this lightwell and the defendant's building runs a brick path or ramp to which the stepping-stones across the lawn lead. The ramp or path has a width varying according to the recesses and projections of the building from two feet seven inches to three feet four inches. Along its length it is separated from the lightwell by a low brick coping nine inches wide. It begins at a level lower than the lawn by nearly eighteen inches, and is reached from the lawn by two steps of brick. The top of these steps is formed with the coping by carrying its brickwork at the same level as the grass transversely across to the wall of the defendant's building. The transverse brickwork which constitutes the step is at the same time carried across to the neighbouring house to form the end of the lightwell. Thus, at the corner of the defendant's building the grass runs up to a brick bar or step from about the centre of which, and at the same level, the brick coping runs at right angles to form the division between the ramp and the lightwell. If anyone steps off the grass, or the bricks at which it ends, to the left of the coping which meets it at right angles, he will descend the steps on to the ramp; but if he steps to the right of the coping he will fall into the lightwell. A pittosporum hedge grows along the boundary fence from the lightwell to the street, and the tree nearest the lightwell is close enough to it to be likely to brush the face of one stepping directly across into the well. Otherwise there is no guard or protection. But in daylight the steps and the well are visible as soon as the corner of the house is reached and no one who looked would be in any danger unless his sight were deficient or his gait uncertain. At the back the defendant's building increases in width and a wall at right angles reaches to the neighbouring building. Both ramp and lightwell end in the blank wall which is so carried across the intervening space. But in the side wall of the defendant's building, near the end of the ramp, a small door opens on to it. It is not constructed for ordinary use as an entrance and its dimensions are only three feet ten inches in height and two feet six inches in width. Inside

the door are a few steps leading under the building and thence to the back yard, the entrance to which is through a lane at the rear. A flat consisting of four rooms at the back of the building opening on to the yard was occupied by a caretaker, a woman. She had agreed with the defendant in exchange for the use of the rooms to pay nine shillings a week and to undertake the duties of keeping the paths clean and the garden in order and to show prospective tenants over vacant flats and generally to take charge of so much of the premises as were not in the occupation of other inmates. She had the defendant's express authority to do what work she could obtain from tenants, and she was not expressly prohibited from doing work for others. It seems that both the house agent for the flats and the occupants whom inquirers disturbed were accustomed to direct prospective tenants and others who sought the caretaker to go round by the path or ramp to the small door in order to find her. Owing to her difficulty in hearing them, she obtained the defendant's authority to put in the door a rotary bell which she could hear from her rooms. For some time, when flats were vacant, a board was exhibited in front of the house inscribed "Flat to let apply side door," but this board was stolen or disappeared.

Before the caretaker was appointed to that office she had done sewing and domestic work by the day, and, among her employers were the plaintiff's mother and sister, who lived in St. Kilda. At one time they occupied one of the flats, the flat at the corner where the ramp begins. Apparently, when they left the flats to reside elsewhere in St. Kilda, they continued the practice of employing her casually. The plaintiff sometimes came to Melbourne and stayed at the same place as her sister. During such a visit on the evening of 1st September 1931 her sister, who had complained of feeling ill, asked the plaintiff to go to the flats in Robe Street and request the caretaker to come to her next day to do some domestic work. The plaintiff two years before had stayed with her mother at the flats during two separate visits, but she did not acquaint herself with the ramp, the side door, or the mode of reaching the caretaker. Accordingly she asked her sister how she would get in touch with her, and received a direction to go to the right side of the building, down some steps, to walk as far as she could, and she

H. C. OF A. 1932.

LIPMAN v. CLENDINNEN.

Dixon J.

would come to a door with a bell. She reached the flats after nine o'clock, when it was quite dark. A light on a balcony or landing in front of the building illuminated the path but not the right side of the building. The plaintiff noticed a worn patch on the grass close to the right-hand corner and crossed from the path to it. She stepped from the lawn on to something hard which she took to be the path, and then she stepped or fell into the lightwell. She sustained injuries consisting of cuts and abrasions, bruises, concussion and shock, and, in consequence, she incurred various expenses. If she is entitled to recover, I think the general damages should be assessed at £150 and the special damages at £40 16s.

The plaintiff can recover damages if, and only if, the hurt which she has sustained arose from the defendant's negligence. But negligence means the breach of some duty to take care which the law imposes. The existence and the extent or measure of such a duty must be a primary, and it often is the principal, question in determining liability. The defendant retained control or occupation of the land upon which the building stands, of the paths, the lawns and the approaches, in fact of the entire premises except the flats actually let to tenants. The duty of care imputed to her depends upon this occupation or control. But possession of property is not in itself the source of any obligation with respect to its state or condition. Its use or enjoyment may be attended with as much, or as little, hazard as the occupier chooses, if he retains exclusive enjoyment of the perils as well as of the advantages of occupation. The circumstance which annexes to occupation the duty of care, when it exists, is the presence or proximity of others upon or to the premises occupied. It is because the safety of such persons may be endangered that the obligation of care arises. But as the purpose of the obligation is that those who come may go unharmed, the existence and the extent of the duty must depend upon their title to be there, upon the object with which they come, and upon the occupier's interest in their presence. Further, the duty may be discharged although the condition of the premises themselves remains dangerous, if other steps, considered adequate for the purpose, are taken to avert harm to the individual. The circumstances in which one man may lawfully come upon premises in the

occupation of another are infinitely various and as his lawful presence there must raise some duty of diligence, however slight, for his safety, it might be considered consonant with general principle to measure the standard of care required by determining as matter of fact what amount of care in all the actual circumstances of each particular case the reasonable man would exercise. But English law has adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and a special standard of duty has been established in reference to each class. Many of the circumstances which might have been considered in reference to the precautions required go now only to the question in what character did the sufferer come upon the premises. Apart from contractual relations (*Maclenan* v. *Segar* (1)), and the execution of an independent authority given by law (*Great Central Railway Co.* v. *Bates* (2) ; *Low* v. *Grand Trunk Railway Co.* (3)), he who enters upon land occupied by another does so in one or other of three characters. The duty owing to him is measured or defined by reference to the category to which he belongs. He comes as a trespasser, as a licensee, or as an invitee. The separation is absolute between these three classes, which are mutually exclusive. A different duty is incurred by an occupier to each class, and these various duties are not to be confused or assimilated. In determining the liability of an occupier, it is imperative that a decision should first be reached fixing the class to which the person belongs who complains of injury. When that has been done, the case must be governed altogether by the standard of duty prescribed for that class (see per Viscount *Dunedin* in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (4)). A trespasser enters at his own risk and cannot complain of any hurt he receives unless it arises from a wilful act of the occupier. Some uncertainty exists, on the one hand, whether a reckless infliction of harm may not be considered wilful, and, on the other hand, whether the act must not only be wilful, but must also exceed any reasonable measure for preventing or deterring unauthorized entry upon the premises. But, in any case, it is clear that, if the

(1) (1917) 2 K.B. 325.
(2) (1921) 3 K.B. 578, at pp. 581-582.
(3) (1881) 72 Maine 313; 39 Am. Rep. 331.
(4) (1929) A.C. 358, at pp. 371-372.

H. C. OF A. 1932.

LIPMAN v. CLENDINNEN.

Dixon J.

plaintiff should be regarded as a trespasser, the present action must fail.

A licensee enters with the consent of the occupier but for purposes in which the occupier has no direct or indirect material interest or concern. The occupier's duty to such a person may be stated as an obligation of reasonable care to prevent his relying upon a deceptive appearance of safety and thus sustaining harm from a danger of which the occupier is aware and he is not. The metaphor " concealed trap " has become almost a term of art for describing the danger from which the occupier must take care to protect the licensee.

An invitee enters not merely with the consent but upon the invitation of the occupier, express or implied, for a purpose in which the occupier himself has some concern, a pecuniary, material, or business interest. With respect to such a person, " using reasonable care on his part for his own safety," the occupier is bound on his part to " use reasonable care to prevent damage from unusual danger, which he knows or ought to know." This obligation of care may arise although the visitor is aware of the danger, and it is not necessarily fulfilled by the occupier's acquainting him of its existence. These are matters to be considered with other circumstances upon the question whether due care has been exercised and " where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact " (*Indermaur* v. *Dames* (1); *Bond* v. *South Australian Railways Commissioner* (2); *Hoy* v. *Auckland Harbour Board* (3)).

The defendant in the present case denies that her duty in reference to the safety of the plaintiff, while pursuing the course she was following from the gate over the grass towards the small side door, was any greater than to a trespasser. The arrangement by which the caretaker occupied rooms in the building necessarily implied the defendant's consent to the entry upon the premises of anyone having lawful occasion to visit or communicate with the caretaker.

(1) (1866) L.R. 1 C.P. 274, at p. 288. (2) (1923) 33 C.L.R. 273.
(3) (1928) N.Z.L.R. 716.

But it is insisted for the defendant that this tacit leave and licence did not extend to the use of the ramp and side door, at any rate at such an hour, or for the purpose of requesting her to forsake her duties as caretaker for service, however brief, elsewhere. I think a general consent upon the part of the defendant should be inferred to the use of the ramp and side door as a means of access by anyone desiring to communicate with the caretaker for any proper purpose. This inference is required by the adaptation of the route for the purpose and by the circumstances attending its actual use. The stepping-stones across the grass, the worn patch, the brick steps and ramp and the door, small and insufficient though it be, provide a prepared way for regular use. These facts are consistent with its use by the inhabitants only, but an inference that it was meant to serve them alone is contradicted by the bell. "The knocker says 'Come and knock me'; the bell says 'Come and ring me'; and a person going on the step to do so is injured" (*sc.* by a concealed danger). "Would not the owner be liable?" per *Byles* J. in *Smith* v. *London and St. Katharine Docks Co.* (1)).

No other way of communication from the front exists: prospective tenants were directed both by the defendant's agent and by the notice board to apply at the side door; and frequently people sought the caretaker there. The defendant knew all this when she gave her authority for the fixing of a bell in the door. These facts, to my mind, spell a consent to its general use as a front access to the caretaker. The need for such an access had arisen out of the purpose which the building served, the employment of a caretaker and the situation of her rooms. Of necessity the consent was general. A tacit permission could not be given to strangers to use the ramp if they came to see the caretaker on the defendant's own business, but not if they came upon their own or upon the caretaker's business. At any rate no such discrimination was attempted either by overt act or by private reservation. Nor can the leave and licence be confined to daylight hours. Such a limitation upon the intercourse of those who dwell in and around flats can hardly be considered to arise from the known habits of city life. That it was a permitted way by day but not by night is a suggestion based on

(1) (1868) L.R. 3 C.P. 326, at p. 331.

H. C. OF A. 1932. LIPMAN v. CLENDINNEN. DIXON J.

nothing except the risk which darkness brings to a place constructed as this was. But at most this means that the defendant might suppose that those fully alive to the possible consequences of mistaking the path would not come, or would come only with extreme caution, not that her tacit but known consent to its use was coupled with a tacit but known condition confining its allowance to times of particular visibility. Again, the purpose of the plaintiff's visit does not take her outside the operation of the licence. To ask the caretaker to do a day's work for her sister was a perfectly proper and lawful thing whether the caretaker under her arrangement with the defendant was or was not at liberty to agree to do it. I think the plaintiff, when the misfortune occurred, was upon the premises with the leave and licence of the defendant.

The plaintiff, however, claims that she was not a mere licensee, but that she entered upon the premises in pursuance of an implied invitation of the defendant and for a purpose incidental to matters in which the defendant had a material interest or concern, and that accordingly, the defendant was bound to exercise reasonable care to safeguard her from such an unusual danger as arose from the proximity of the open lightwell. The nature and the degree of interest which the occupier must have in the object of the visit before the visitor is entitled to receive the protection of an invitee have not been defined with exactness. The expression "common interest" has been criticized as a phrase not happily chosen to represent the ground of the distinction (see per *Neville* J. in *Hayward* v. *Drury Lane Theatre and Moss' Empires* (1)). No doubt the expression was appropriate to the typical case of a customer in a shop, but even his case supplies illustrations which show that invitation implies no welcome and community of interest, no mutuality of advantage. "This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality,

(1) (1917) 2 K.B. 899, at p. 918.

or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be to the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied " (per *Willes* J., *Indermaur* v. *Dames* (1)). The occupier has sufficient " interest " although the visitor comes upon business not with the occupier but with others, if the occupier provides the use of his premises as a matter of pecuniary interest so that business of the kind may be transacted. In *Smith* v. *London and St. Katharine Docks Co.* (2) a tradesman who crossed a gangway for the purpose of business with a member of a ship's company was held to be an invitee of the Dock Company which supplied access to the ship. In *Elliott* v. *C. P. Roberts & Co.* (3) a contractor for a building had agreed with the building owner to permit " specialists " to use his scaffolding and a servant of a " specialist " was considered to be an invitee of the contractor in respect of the scaffolding. In *Leveridge* v. *Skuthorpe* (4) a girl was hurt at a hall let by the occupiers for an evening concert while she was assisting those who at the request of the hirers were decorating it for the performance ; she was held to be an invitee of the occupiers. The visitor comes on a matter of material interest to the occupier if his presence is in a general way ancillary to the business carried on by the occupier. Thus friends who attend the departure or arrival of travellers by train come upon railway stations as invitees (*Watkins* v. *Great Western Railway Co.* (5) ; *Redpath* v. *Railway Commissioners* (6) ; *Langton* v. *Board of Land and Works* (7)). An actress is an invitee in attending rehearsals in the expectation of engagement in the

(1) (1866) L.R. 1 C.P., at p. 287.
(2) (1868) L.R. 3 C.P. 326.
(3) (1916) 2 K.B. 518.
(4) (1919) 26 C.L.R. 135.
(5) (1877) 37 L.T. 193 ; 46 L.J. Q.B. 817.
(6) (1900) 21 N.S.W.L.R. 234.
(7) (1880) 6 V.L.R. (L.) 316.

H. C. OF A. 1932.

LIPMAN v. CLENDINNEN.

Dixon J.

performance (*Hayward* v. *Drury Lane Theatre and Moss' Empires* (1)). It is enough if the visitor comes upon business in his own interest but in the course of a transaction with the occupier to which his visit is reasonably incidental; as in the case of a tradesman seeking payment of his bill (*Pritchard* v. *Peto* (2)), of a prospective tenant inspecting a dwelling (*Wright* v. *Lefever* (3)), of one complaining that the occupier in the course of his trade is acting in a way which tends to the prejudice of the calling followed by the visitor (*White* v. *France* (4)). The occupier has a material interest if the transaction, although not with the occupier, consists in the performance of work upon the premises with his sanction and for his advantage. Thus a landlord of a building let in flats was held to have a material interest in the presence of a contractor's servant who was hurt while removing the contractor's advertisement from the exterior of the building after completing for a tenant some internal repairs, to the cost of which, however, the landlord had agreed to contribute (*Sutcliffe* v. *Clients Investment Co.* (5)). From these examples it sufficiently appears that the business or material interest of the occupier need not lie in the fulfilment of the immediate purpose actuating the visit. It may be found in the more general consideration that for reasons of business, or through the exigencies of ordinary affairs, the occupier has given an invitation extensive enough to include the particular purpose, whether the invitation is express or implied from the use to which he puts the premises, from his conduct, or from other circumstances. But the interest must be pecuniary or material and not social or domestic.

In the present case the defendant occupied the premises for the purpose of letting flats at a rent and providing the necessary approaches and appurtenances for the service of flats. Upon this view of the matter it was said that she thus invited those who had lawful business with the inmates to enter upon the premises and that she did so for business reasons. Further, it is suggested that the caretaker occupied a position no less favourable than a tenant, and that the very terms upon which she was employed imply a

(1) (1917) 2 K.B. 899.
(2) (1917) 2 K.B. 173.
(3) (1903) 51 W.R. 149.
(4) (1877) 2 C.P.D. 308.
(5) (1924) 2 K.B. 746.

supposition that on and from the premises she would carry on some remunerative occupation involving, or possibly involving, visits from those having business with her. In point of fact I do not think the defendant did contemplate the caretaker's doing work outside the flats. The arrangement made between them neither expressly nor impliedly prohibited her from doing so, but it did impose upon her the obligation to look after the flats generally and to see that intending tenants were shown over them. No doubt those duties did not require her continual presence in the building, and no doubt some of them might be entrusted to a deputy. But their nature appears to me to negative rather than to support the inference that the defendant authorized or permitted her to earn her living by doing domestic work. This inference really depends upon the assumption that the caretaker was compelled to seek domestic work because she had no other sufficient livelihood and that the defendant knew it, but no evidence was given to that effect. Independently of this question of fact, the concern of the defendant in the visits received by any inmate of the flats, whether strictly her tenant or a caretaker, and whether the visit be on the inmate's business or not, seems too remote and fanciful to provide the basis of material interest. In any case it is, I think, no longer possible to hold that the invitees of tenants of a common dwelling are more than the licensees of the landlord who retains possession and control of the approaches. In *Fairman* v. *Perpetual Investment Building Society* (1) the plaintiff lodged with her brother-in-law, a tenant of a flat served by a common stair under the landlord's control. She was injured by a defect in the stair. It was held in the House of Lords, by a majority, that she was not an invitee of the landlord. Lord *Atkinson* said (2):—"She was undoubtedly, when using the stairs, using them as the invitee of the tenant, though not of the landlord. *Quoad* the landlord she was, I think, when using them at most merely his licensee." Lord *Sumner* said (3):—"My Lords, I think that the plaintiff was the defendants' licensee not their invitee. Somebody builds the stairs, and the defendants open the door, but the tenant gives the invitation. It was not about the

(1) (1923) A.C. 74. (2) (1923) A.C., at p. 85.
(3) (1923) A.C., at p. 92.

H. C. OF A. 1932. LIPMAN v. CLENDINNEN. DIXON J.

landlord's business that the plaintiff used the stairs, though it may well be that, as a lodger to whom the tenant was seemingly entitled to sub-let a room, she had such a right to go in and out as to make her licence irrevocable, so long as she remained a lodger." Lord *Wrenbury* said (1): "She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the tenant and all persons lawfully resorting to the tenant's premises." It is true that in discussing *Miller* v. *Hancock* (2), which, in effect, if not in form, they overruled, their Lordships speak as if in that case the plaintiff, who was injured upon a common stairway under the landlord's control when returning from the offices of a tenant with whom he had business, was or might have been an invitee of the landlord. This may be accounted for by the business character of the premises. It is true also that both Lord *Buckmaster* and Lord *Carson* considered that the plaintiff in *Fairman's Case* (3) was an invitee of the landlord as well as of the tenant. But the decision has generally been regarded as finally deciding that a visitor who comes on business with a tenant of a flat and uses the access which remains in the occupation and control of the landlord is no more than a licensee of the landlord. See *Connor* v. *Howden* (4); *O'Reilly* v. *Doherty* (5); *Grimes* v. *Middleton* (6); *Foa, Landlord and Tenant*, 6th ed., p. 164; *Clerk and Lindsell, Torts*, 8th ed., p. 439, and *Salmond, Torts*, 7th ed., pp. 453-454. The plaintiff must, therefore, be considered as a licensee and not an invitee of the defendants.

The question whether the existence of the unlit and unguarded lightwell involved a failure of the occupier's duty to the plaintiff as a licensee occasions more than one difficulty. The facts of the case raise for consideration three matters of law each said to be enough to disable the plaintiff from success.

(1) In the first place, the plaintiff's leave and licence from the defendant arises from her mission to or relations with the caretaker considered as an occupier of flats or rooms in the defendant's building.

(1) (1923) A.C., at p. 95.
(2) (1893) 2 Q.B. 177.
(3) (1923) A.C. 74.
(4) (1924) N.Z.L.R. 181, at p. 184.
(5) (1928) N.Y. 32, at p. 36.
(6) (1931) Sc.L.T. 84.

It is only because she came upon the implied invitation, or at least with the tacit consent, of the caretaker that she comes within the general leave and licence of the defendant. Now, it is not easy to see how the caretaker who agreed to take the rooms with the existing means of access could complain of any harm suffered by reason of its construction and unlit and unguarded condition. But it is often stated that the owner in control of the access to premises, which he has let to a tenant, incurs to one who comes upon them as a visitor of the tenant no greater duty of care than he owes to the tenant. In *Huggett* v. *Miers* (1) *Farwell* L.J. said: "I altogether dissent from the contention . . . that . . . a member of the public using the staircase on the invitation of the tenant can have a greater right than the tenant himself." See, too, per *Gorell Barnes* P. (2) and *Blaufarb* v. *Drooker* (3). Accordingly, as no condition of apparent danger, either in the state of the premises themselves, or in the nature of the access leading to them, supplies any reason in law for fastening upon the landlord a liability to a tenant who takes them unconditionally in that state, it has appeared to follow that with respect to strangers visiting the tenant the landlord must enjoy a like immunity. Thus, if a tenant is content to approach his dwelling by a ladder, by steep or narrow steps, by a plank, by a girder over a stream, by an unguarded flight of steps bridging an area, or by an unfenced or unlighted staircase, his visitors could not complain that his landlord did not provide an access of a different or a safer character. Compare per *Atkin* J. in *Lucy* v. *Bawden* (4); per *Lush* J. in *Dunster* v. *Hollis* (5); per *Phillimore* L.J. in *Dobson* v. *Horsley* (6); per Lord *Buckmaster* in *Fairman* v. *Perpetual Investment Building Society* (7). Nevertheless, I am unable to think that it is an accurate statement of the law that a landlord who is in possession and control of the means of access to rooms occupied by his tenants owes to their visitors no higher duty of care than to the tenants themselves with reference to the safe use of the approaches. The duties appear to me to arise from different relations and, according to circumstances, either one

(1) (1908) 2 K.B. 278, at p. 288.
(2) (1908) 2 K.B., at p. 284.
(3) (1925) 251 Mass. 201.
(4) (1914) 2 K.B. 318.
(5) (1918) 2 K.B. 795, at p. 799.
(6) (1915) 1 K.B. 634, at p. 642.
(7) (1923) A.C., at pp. 81-82.

H. C. OF A. 1932. LIPMAN v. CLENDINNEN. Dixon J.

may be higher than the other. The visitor is not in privity with the landlord, but the relation of landlord and tenant is established by contract. The obligations of the lessor in respect of the access to the leased premises must be controlled, if not determined, by the implications made in the contract, or by its express provisions. By express provision, the landlord may obtain complete freedom from responsibility for harm to his tenant howsoever caused. But surely this would not affect his duty to those who, with his permission, visit his tenant, a duty which is imposed by positive law in virtue of the fact that he allows them to come within the area of his possession and control. It may be that in some circumstances a landlord whose tenant is aware of the danger may reasonably rely upon his warning those whom he brings there, but, if it be so, the result is not that the landlord has incurred no duty to the licensees, but that he has not broken it. That the danger from which the plaintiff suffered is an apparent feature of the means of access adopted by the caretaker is a fact of importance in considering whether the condition of the lightwell amounted to a concealed trap, and it shows that, in any case, at common law, the caretaker could not complain of injury arising from it, but I do not think it follows as a necessary conclusion of law that the plaintiff has no cause of action.

(2) The second matter of law which would, upon the facts, form a positive answer to the plaintiff's claim arises from the many reported judicial statements to the effect that an occupier's duty of care to a licensee is broken only by the introduction of some new danger in the premises after permission is given. For instance, in *Hayward* v. *Drury Lane Theatre and Moss' Empires* (1) *Scrutton* L.J. says " the owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them." And again " The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former." These statements were adopted by *Atkin* L.J. in *Coleshill* v. *Manchester Corporation* (2). In the present case, if such an absolute distinction exists as a rule of law, it would necessarily be fatal to the plaintiff's

(1) (1917) 2 K.B., at p. 914.

(2) (1928) 1 K.B. 776, at p. 793.

claim. But it is difficult to reconcile it with principle. The foundation of the doctrine governing the liability to licensees is the view that, as the licensee resorts to the occupier's premises for his own benefit alone, the occupier should not be expected to take any particular precaution to avert the consequences which arise from the nature or condition of the premises of which the licensee seeks gratuitous use, but, on the other hand, that, if the occupier knows that the premises in his control contain a hidden danger as to the existence of which he would expect the volunteer to be deceived when he availed himself of the occupier's permission, then the latter ought to undeceive him or take some reasonable precautions for his safety from the concealed peril. Why should this duty exist if the licensee is misled because the condition of the premises changes, but not if he is misled because the appearance they present conceals their real insecurity? The analogy of gratuitous loans and gifts of chattels which the lender or giver knows to conceal a danger seems to have affected this branch of the law (see per *Willes* J. in *Indermaur* v. *Dames* (1) and in *Gautret* v. *Egerton* (2)). But in such cases it is enough if the giver of the thing "knew its evil character *at the time*, and omitted to caution the donee" (*Blakemore* v. *Bristol and Exeter Railway Co.* (3); *Coughlin* v. *Gillison* (4)). It is to be observed that the received explanation of *Cooke* v. *Midland Great Western Railway of Ireland* (5) to the effect that the child in that case was a licensee (see *Robert Addie & Sons (Collieries)* v. *Dumbreck* (6); *Latham* v. *R. Johnson & Nephew Ltd.* (7)), involves the position that the antecedent existence of a trap is enough. For these reasons I think the fact that no alteration was made in the condition of the lightwell after the defendant gave her consent to the entry of such persons as the plaintiff upon the premises is not decisive of her claim. Of course, in many cases as a matter of fact, not of law, a trap could only exist in virtue of some alteration in the premises.

(3) There remains the third matter of law which, if correct, must upon the facts absolve the defendant from any failure in her duty

(1) (1866) L.R. 1 C.P., at p. 286.
(2) (1867) L.R. 2 C.P. 371, at p. 375.
(3) (1858) 8 E. & B. 1035, at p. 1051; 120 E.R. 385, at p. 391.
(4) (1899) 1 Q.B. 145.
(5) (1909) A.C. 229.
(6) (1929) A.C., at p. 367.
(7) (1913) 1 K.B., at pp. 408, 416, and 418

H. C. OF A. 1932.

LIPMAN v. CLENDINNEN.

DIXON J.

towards a licensee. It is said that if the dangers arising from the manner in which premises are designed and constructed are apparent in daylight, then they cannot constitute a concealed trap when they are hidden in the darkness of night. In *Latham* v. *R. Johnson & Nephew Ltd.* (1) Lord *Sumner* (then *Hamilton* L.J.) says:—"The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril." This statement was adopted by *Atkin* L.J. in *Coleshill* v. *Manchester Corporation* (2) and by Viscount *Dunedin* in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (3).

In *Mersey Docks and Harbour Board* v. *Procter* (4) Lord *Sumner* said:—"If the danger is obvious the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements." These statements with reference to the consequence of darkness are not, I think, of universal application. Probably they refer to judicial decisions and observations relating to injuries sustained through darkness the general effect of which they were intended to represent. In *Bolch* v. *Smith* (5) *Wilde* B. suggests that an occupier who, having placed a quantity of stones in his yard, gave permission gratuitously to a stranger to walk across the yard would not be liable if the latter fell over them in the dark, but that he might be if a pit which was usually left covered was left uncovered on a particular night and the licensee fell into that. In *Huggett* v. *Miers* (6) "the facts were that separate chambers up a common staircase were let to tenants, and each tenant provided a light at the door of his chambers. The landlord was under no obligation to provide a light. At the moment when the accident happened there were no lights burning; the staircase was dark. The plaintiff, who was an employee of one of the tenants, fell and was injured. It was held that the landlord was not liable; for he was not under any

(1) (1913) 1 K.B., at p. 411.
(2) (1928) 1 K.B. 776, at p. 791.
(3) (1929) A.C., at pp. 370-371.
(4) (1923) A.C. 253, at p. 274.
(5) (1862) 7 H. & N. 736, at p. 742; 158 E.R. 666, at p. 668.
(6) (1908) 2 K.B. 278.

obligation to light his staircase; and by not doing it he was not laying a trap for the man" (per *Buckley* L.J. in *Dobson* v. *Horsley* (1)). In *Lewis* v. *Ronald* (2) an invitee who attempted to find his way in the dark and fell down a flight of stairs failed in his action, because, knowing nothing of the place, he walked upon the assumption that there was a continuously level surface, the actual condition of things not being such as he could not reasonably have expected. *Wilkinson* v. *Fairrie* (3), although in itself a case of small importance and doubtful correctness, has occasioned some observations which have often been cited. According to *Isaacs* J. in *Gorman* v. *Wills* (4) the case should be regarded as one relating only to licensees. So considered, it is a decision that no breach of duty is committed by directing a volunteer to take a stairway dangerous only because it is then in darkness. In *Indermaur* v. *Dames* (5), in the Common Pleas, *Willes* J. said of it: "In the case of *Wilkinson* v. *Fairrie* relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as falling down into a pit." In the Exchequer Chamber *Blackburn* J. appears to have said that the case ought to be supported on the ground that the plaintiff chose to go into the premises and wander about in the dark in a way the defendant could not anticipate (*Indermaur* v. *Dames* as reported in the *Law Times* (6), combined with the *Law Journal* report (7)). These cases explain and illustrate Lord *Sumner's* observations, but they suggest that he meant to refer only to risks arising from physical features of the occupier's premises which were not so incongruous with its character or the purposes for which it was known to be appropriated as to falsify all reasonable expectation. It is difficult to believe that a licensor, who actually witnessed his licensee walking in the dark along a path unfamiliar to him in which there was a dangerous obstacle apparent in daylight but not discernible at night, would not be guilty of a breach of duty if he failed to warn him. Compare *Kimber* v. *Gas Light and Coke Co.* (8).

(1) (1915) 1 K.B., at p. 640.
(2) (1909) 101 L.T. 534.
(3) (1862) 1 H. & C. 633; 158 E.R. 1038; 7 L.T. 599.
(4) (1906) 4 C.L.R. 764.
(5) (1866) L.R. 1 C.P., at p. 288.
(6) (1867) 16 L.T. 293, at p. 294.
(7) (1867) 36 L.J. C.P. 181, at p. 183.
(8) (1918) 1 K.B. 439.

H. C. OF A. 1932. LIPMAN v. CLENDINNEN. Dixon J.

For these reasons I do not think that any of the three matters referred to constitutes an insuperable legal answer to the plaintiff's action. In my opinion the facts (i.) that the injured person was brought upon the premises by a tenant who took them in the condition complained of, (ii.) that the danger or defect existed in the premises when the licence was given by the occupier and (iii.) that the danger was not hidden, except by darkness, are all circumstances which must be considered in determining whether the occupier has omitted to use the care to which the licensee is entitled, but none of them is in itself necessarily decisive of that question. Upon many states of fact one or other of these matters may prove to be fatal to the licensee's success, because it disables him from establishing that he suffered from a concealed source of danger of which the occupier knew, but which he himself, although using due care, failed to avoid owing to a reasonable belief in a safer condition of the premises. The duty of the licensor is one of care to prevent injury to the licensee from such "concealed traps." "A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger" (per Lord *Sumner* in *Latham* v. *Johnson* (1)). In *Gautret* v. *Egerton* (2) *Willes* J. uses the term, among other expressions, in describing the licensor's duty. He speaks of a wrongful act such as digging a trench on the land or misrepresenting its condition or anything equivalent to laying a trap for unwary passengers. After likening the dedication of permission to use the way to something in the character of a gift, he says:—"There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows

(1) (1913) 1 K.B., at p. 415. (2) (1867) L.R. 2 C.P., at pp. 374-375.

strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger." The reference to fraud does not imply that misconduct on the part of the occupier is a necessary part of the cause of action. It means that the licensee must in fact have been misled somehow into encountering a hidden danger and that the occupier, however innocent in intention, must have known of the existence of the danger. The rule is usually stated as an exception to a general proposition that the licensee must take the premises as he finds them, that, as he is or occupies the position of a volunteer, he cannot complain of the character of the premises he is permitted to use and must "take the permission with its concomitant conditions, and, it may be, perils" (see the judgment of *Farwell* L.J. in *Latham* v. *Johnson* (1)). Recent statements of what constitutes a trap appear to insist less than earlier authorities upon the licensee's own vigilance and to describe the requirement of concealment in language admitting of more latitude of application. For instance, in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (2), Lord *Hailsham* L.C. describes the duty as not to create a trap or to allow a concealed danger to exist upon premises which is not apparent to the visitor, and in *Kimber* v. *Gas Light and Coke Co.* (3) *Scrutton* L.J. defines a trap as a danger which could not be avoided by a person previously ignorant of it, but who uses reasonable care. In the judgments of Lord *Wrenbury* in *Fairman's Case* (4) and of Lord *Sumner* in *Mersey Docks and Harbour Board* v. *Procter* (5) will be found a more extended and informative treatment of the matter, which is further illustrated by judgments in *Coleshill* v. *Manchester Corporation* (6).

The result of the authorities appears to be that the obligation of an occupier towards a licensee is to take reasonable care to prevent harm to him from a state or condition of the premises known to the occupier, but unknown to the visitor, which the use of reasonable

(1) (1913) 1 K.B., at pp. 404-407.
(2) (1929) A.C., at p. 364.
(3) (1918) 1 K.B., at p. 446.
(4) (1923) A.C., at p. 96.
(5) (1923) A.C., at pp. 274, 276, 278.
(6) (1928) 1 K.B., per *Scrutton* L.J., at p. 788; *Atkin* L.J., at pp. 792-794; and *Eve* J., at pp. 796-797.

H. C. OF A 1932.

LIPMAN v. CLENDINNEN.

DIXON J.

care on his part would not disclose and which, considering the nature of the premises, the occasion of the leave and licence, and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect. Three of the requirements contained in this statement are clearly fulfilled by the facts of the present case. The injury suffered by the plaintiff was undeniably caused by the state or condition of the premises. That condition was known to the defendant. It was unknown to the plaintiff. Nor can there be much doubt about the danger of this condition. At a turn where a continuous level surface ends in a step, the existence of an adjacent pit nearly six feet deep with its abrupt edge uniform with the step in level and alignment would, I think, provoke in any but the thoughtless an instinctive apprehension of mischance. In daytime the lightwell can be seen and avoided, but, even so, a false step, an impulsive movement, a failure of bodily control or a momentary inattention to direction may have serious consequences. The real difficulty lies in the question whether in darkness the danger possesses the qualities of " concealment and surprise." I have come to the conclusion that an affirmative answer should be given to this question. In the first place, I do not think the exercise of ordinary care would disclose the danger to a visitor who was unaware of the existence of the lightwell. It is true that my inspection of the premises was conducted in daylight, but I feel little doubt that, unless the visitor carried a light, he would be unlikely as he passed between the walls of the two buildings to ascertain the presence of the cavity except by tumbling into it. I do not think the windows of the lighted room at the corner of the flat would illuminate the ramp and the well. To carry a light or obtain matches appears to me to be a precaution in excess of the degree of care which ordinary prudence would dictate in the use of an approach to a side door of suburban flats, notwithstanding that it contains steps. In the next place, the particular construction of the ramp and lightwell is quite unusual. Such things must rarely exist at the ground level of an ordinary dwelling. An open pit, whatever its purpose, placed at the edge of a grass plot in proximity to a pathway leaving the grass, is at least surprising. The juxtaposition of the pit, the steps and the lawn at the corner on the way to the door, appears to me

to be so entirely out of keeping with the character of premises used as dwellings in the suburbs of Melbourne that a visitor would almost certainly fail to anticipate or suspect such a danger. Reliance on the absence of such a danger would be certain. The continuation of the brickwork forming the step across as the edge of the lightwell contributes further to the likelihood of misapprehension. In darkness or in any insufficient light it would be easy to mistake the edge of the lightwell for the step. Indeed the plaintiff appears to have put her foot either upon that or upon the coping near its junction with the step, and to have been misled into thinking she was on the path. These elements appear to me to require the conclusion that at night the condition of the place constituted a hidden danger from which it was the duty of the defendant to exercise reasonable care to safeguard a licensee such as the plaintiff. The defendant did not, in my opinion, exercise reasonable care to prevent harm to visitors from this danger. She could not reasonably rely upon an expectation that anyone who came at night to visit or communicate with the caretaker would be aware of the danger or would have been cautioned by the caretaker, or by those who directed him. I do not think the plaintiff was guilty of contributory negligence.

There will be judgment for the plaintiff for £190 16s. with costs.

Judgment for the plaintiff accordingly.

Solicitors for the plaintiff, *Knox & Hargrave.*

Solicitors for the defendant, *J. M. Smith & Emmerton.*

H. D. W.