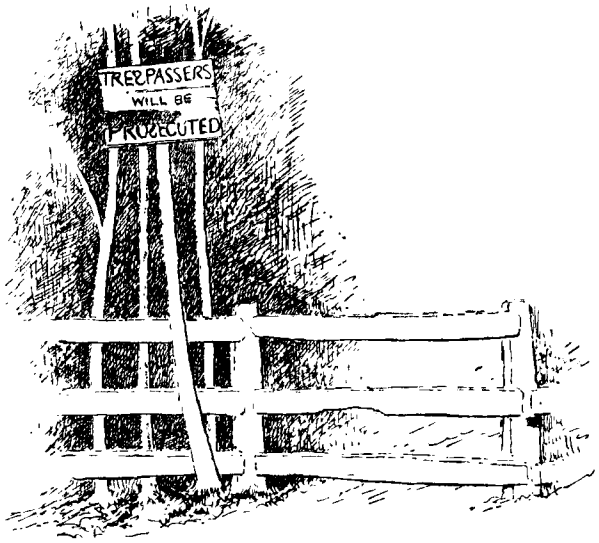


There will be few members of a Club like ours who have not in the course of their wanderings been brought up against a notice in the above familiar form, varied sometimes by the direful addendum " with the utmost rigour of the law."

It is proposed to discuss this disquieting notice and see what it really means—from a purely legal standpoint. To consider it from any other standpoint would serve no useful purpose, as fair criticism would be liable to be coloured by one's individual attitude of mind towards rights of private property in land—as to which, no doubt, there may be differences of opinion among members. As a preliminary it should be understood that from a legal standpoint it is quite immaterial whether or not land is protected by such warning notices. In other words, there is no obligation to warn trespassers and the absence of such a notice is no answer. But, as we shall see, there are two kinds of trespassers—the harmless and the harmful. It is because these notices fail to discriminate between

N.B.—This article is written in reference to the law of trespass in England and Wales and should not be relied on by the wanderer in Scotland, in which country the law is in some respects different from that in England and Wales.

the two classes that they are so misleading. That they do in fact deter many a timid wayfarer from proceeding on his way for fear of bringing himself into conflict with some indefinable consequence is common knowledge. To such an one the notice has the appearance of a "lion in the way," but when he comes to close quarters with the fearsome-looking Thing the wayfarer will discover that instead of a leonine roar the Thing is only capable of giving forth a sound like that of Æsop's harmless beast. It is only a *brutum fulmen*, or, in the language of a famous lawyer, a "wooden falsehood" the continued use of which rests on antiquity and psychological effect. Let us see how this comes about. There is no doubt that from early times the law has been very jealous of the rights of land owners, and in its zeal has at times exhibited an almost ludicrous solemnity in discouraging trifling trespasses. There is a reported case in which it was solemnly held by the Judges of the King's Bench ninety-one years ago that it was an actionable trespass "to place a single pebble so as to lean against my neighbour's wall." That, however, was a civil action for damages; it has no bearing on the notice under discussion and is adduced merely as an extreme example of the strict attitude of the law towards the sacred right of private property in land.

The effective word in all these notices is "*prosecuted.*" In the popular mind this word instinctively conjures up (and is intended to conjure up) visions of police, magistrates and goal. If the notice merely said "Trespassers will be sued for damages" all the sting would be taken out of it and every schoolboy would laugh it to scorn. And yet it is only in this emasculated form that it has any real truth or meaning. Let there be no mistake about it: You cannot be legally "*prosecuted*" for a bare trespass, namely, one which does no harm except to the feelings of some feudally-minded owner. For such a trespass the owner's only remedy is an action to recover such compensation as he can prove he has sustained, and damage of the "moral and intellectual" type won't do.

An illustration on either side of the dividing line will help to visualise the position more clearly. We will not be content with fictitious cases but cull real ones from

> "That codeless myriad of precedent;
> That wilderness of single instances,"

which is the beloved storehouse of the lawyer. In the first case some small boys were peaceably enjoying a game of football in a field adjoining a garden when an erratic punt landed the ball " over the garden wall." One of the boys forthwith invaded the garden to recover the ball; but the irate owner had watched the whole proceeding and laid an information before the magistrates against the unfortunate boy for what he conceived to be a deliberate violation of his rights. As the boy's education had doubtless led him to expect he was convicted. But friends did not forsake him. Someone gave him sound advice and the conviction was challenged in the Court of Appeal. That Court unhesitatingly quashed it on the ground that where the damage was inappreciable there could be no conviction and the prosecution was accordingly unwarranted. This decision still holds good and settled the principle by reference to which future cases will be governed.

The next case is on the other side of the line. Three men disregarding a notice that trespassers would be prosecuted and ignoring a request by the farmer to turn back, deliberately walked three abreast across a field of long grass. They were summoned under the same statute and on the same charge as the boy in the football case. The magistrates being satisfied on the evidence that real damage had been wilfully done the men were duly convicted. On the strength of the football case they went to the Court of Appeal hoping for a similar result, but were disappointed. The Court distinguished between the two cases on the ground that this was a malicious act which was proved to have done real as distinct from imaginary damage and upheld the conviction. These cases clearly illustrate the well-defined line between the innocent and the guilty trespass. It will be perceived that in every case the question is one of degree. It is true that magistrates sometimes claim to justify a conviction by " finding " damage which is non-existent: But such a conviction cannot stand. Once the governing principle is grasped its application is not difficult as the wayfarer should easily be able to determine for himself whether he is committing an offence in crossing private land—notice or no notice. His conscience alone will tell him. The principle is the same whether the land crossed is a lowland pasture or an upland wild. In the latter case if it be the nesting or the shooting season the wanderer will obey the

prompting of conscience and the call of the grouse to " Go back—go back."

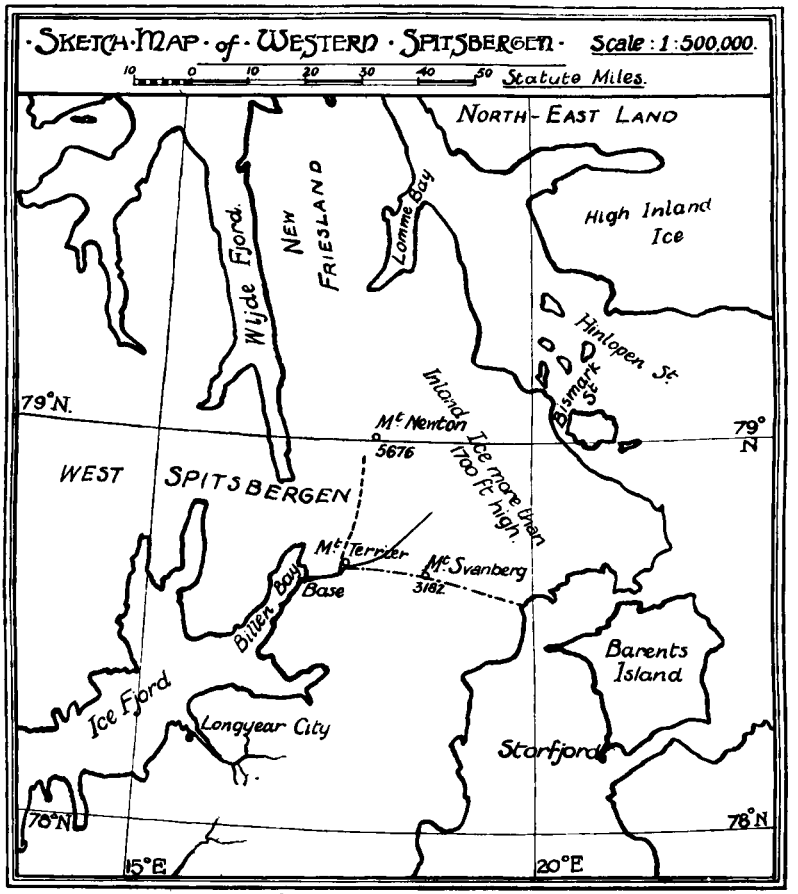
But there is another aspect of the case. It sometimes happens that instead of the " wooden falsehood " the wayfarer encounters the owner or, more usually, the keeper (and his dogs). As a rule neither of these is wooden—more probably flint. The problem then becomes more realistic and immediate. Ordinarily the owner will be found to be more amenable to reason than the keeper, and a little politeness usually suffices. The normal type of keeper however has an attitude of mind of his own towards trespassers. He recognises but one class and regards them all as law breakers. His training and the Game Law is no doubt responsible for this. It is not merely that game birds and their haunts are sacrosanct, but he knows he is armed by the law with special powers to deal with trespassers " *in pursuit of game.*" In the eye of a keeper *all* trespassers are *prima facie* in that category—he cannot conceive anyone being amongst the grouse for any other purpose. Be the wanderer ever so innocent he may be required to give his name and address and forthwith quit the land. Should he refuse the keeper may " apprehend and convey " him before a magistrate so long as he does it *molliter*—to use the quaint legal term. For obvious reasons this drastic remedy is not hastily resorted to. In the first place the encounter may occur at some wild spot miles from anywhere, where corporeal apprehension *vi et armis* is not a practicable proposition. In the next place the keeper knows that when he gets his quarry before the magistrates he will have to satisfy them that not merely was he trespassing but trespassing " *in pursuit of game,*" and should he fail to do so may have to face an action for wrongful arrest. Whilst therefore the risk is practically negligible in the case of an ordinary wayfarer it is as well to know and recognise the power exists, particularly if the expedition is a nocturnal one.

This disposes of our subject so far as *prosecution* (*i.e.*, criminal proceeding) is concerned. But to complete our survey it seems desirable to explain the position if instead of " *prosecuting* " the trespasser the owner takes the milder course of suing him for damages in a civil court. As we have seen, in order to justify conviction by the magistrates, the guilty mind, or what the lawyers

term " *mens rea* " is essential: But in a civil court the question of motive is quite irrelevant, for in such a case trespass is a wrong *in itself.* In other words, damage is presumed. Should the harmless wayfarer be required to answer a County Court summons he should at once pay into court a nominal sum (say 1/-) to cover the imaginary " damage." The effect of this will be to put the plaintiff to proof of real damage or he fails. For this reason the owner's remedy by civil action is ordinarily a futile proceeding and is in practice not resorted to in the case of a bare trespass unaccompanied by any claim of right.

It should be thoroughly understood that this article has not been written with any idea of encouraging promiscuous trespassing but merely to explain the law of trespass in popular language. It is true that everyone is *supposed* to know the law—*ignorantia legis neminem excusat.* But this is a delightful fiction—indeed, the more the average layman knows about the law the greater his risk of becoming confused and therefore enmeshed in it. But it is unnecessary to remind members that quite apart from legal considerations they enjoy many valued privileges through the courtesy of some of the Derbyshire and Yorkshire landowners. It would therefore be ungracious for the Club to countenance anything which (though legally unassailable) might have a tendency to impair friendly relationships of some twenty years standing. Whilst saying this and acknowledging the courtesy received at the hands of these friendly landowners (and through them of many friendly keepers), there are owners who are not so considerate and who hold —and sometimes claim to exercise—extreme views of their rights. There are also members who have on emergency misconceived their own position and rights. If this article does anything to remove misapprehension as to the legal position by any party interested, its purpose will have been achieved.

C. H. PICKSTONE.



Conway & Garwood (1897).
Russian Traverse W. to E. Coast.
Oxford Expedition.