In spite of this apparent judicial predisposition that an award of damages in patent litigation is an award of compensation for gains or profits to the patent owner, the court in the instant case suggests two avenues of hope for the taxpayer. First, the taxpayer in his complaint in the patent infringement action should allege specifically "loss or damage to capital" and not merely ask for "damages." The second test suggested is that the master in making the award should take evidence of damage to the plaintiff's capital and make the award to compensate the taxpayer for such loss. However, in view of the Act of Congress of 1946[8] making the basis of recovery in patent infringement actions general damages, abolishing sessions before Masters, the two tests presented seem to have practical significance only in patent infringement suits commenced prior to 1946. PATRICIA MAHONEY

Torts — Remedies Available for Continuing Trespass — Agents of the defendant, city of New York, had placed refuse on Plaintiff's land over a substantial period of time and failed to remove it. Plaintiff commenced action within six months of the last dumping but failed to allege whether he was suing in trespass or for nuisance. The New York Code contained a statute of limitation which provided for recovery against the city only if the action were commenced within six months of the alleged offense. Plaintiff was desirous of recovery for all the damage done by the numerous disposals, but the city contended that plaintiff could recover only for the last trespass. *Held:* The claim here was for non-feasance and the plaintiff did not claim damages for the overt act. This was a continsing trespass against which the statute of limitations will not run. *Bompton Realty Company v. City of New York, 91 N.Y.S. (2d) 780, (1949).*

This case is a typical example of the tendency of the courts to make no distinction between a problem involving a continuing trespass and one involving a private nuisance. Originally the courts held to the hard fast rule that when a plaintiff who had a cause of action at law sought an injunction, the question must be decided in a court of law prior to resort to equity.[1] The reason was given that if the plaintiff had an

[8] Act of Congress, 1946, amending Revised Statutes 4921 (U.S.C.A. title 35, Patents, Sec. 70) "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for making, using or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interest as may be fixed by the court . . . See Senate Committee on Patents, Senate Report No. 1503, June 14, 1946. See Biesterfeld, Chester, *Patent Law*, Ch. XVI, pp. 166-169.

[1] Zander v. Valentine Blatz Brewing Company, 95 Wis. 162, 70 N.W. 164 (1897); Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 Atl. 861

adequate remedy at law he should seek recourse in that court.

Thus the case under discussion presents the question whether if the plaintiff seeks relief for trespass he can only recover for the last trespass of the defendant on his land. This, of course, was the contention of the defendant. If the technical definitions of tresspass and nuisance are strictly followed and the continuing aspect ignored the defendant's contention was correct. The distinction between the two has always been fairly clear. A trespass is a direct infringement of one's property interests while a nuisance is the result of an act which is not wrongful in itself but only in the consequences which may flow from it.[2] More generally stated, a nuisance consists of the use of one's own property in such a manner as to cause injury to the property or other right or interest of another and generally results from the commission of an act beyond the limits of the property affected.[3] Under these rules the placing of ground upon the land of another should be considered a trespass, and the statute of limitation should begin to run at the time of the entry.[4]

Today, however, where there is such an invasion which continues through failure to remove the object left on the land there is a continuing trespass so long as it remains, and the statute of limitations will not begin to run.[5] Notice the similarity to nuisance, and yet it has been held that the proper place to commence an action for a continuing trespass is in a court of law.[6]

In view of what has been said it can be seen that the term "continuing tresspass" is used synonymously with nuisance. It is aptly put by *Prosser:*

> "A continuing trespass affords a continuing cause of action, which can hardly be distinguished from a nuisance and has been dealt with indiscrimantely as either."[7]

To this point it appears that a continuing trespass is treated as a nuisance although it bears the label of tresspass. What is the redemy awarded for the wrong? *Walsh* says:

> "Injunction will be made against continuous tresspass or a succession of trespasses which threaten to be continued indefinitely, in order to prevent a multiplicity of suits."[8]

(1908); Methodist Episcopal Soc. v. Akers et. al., 167 Mass. 560, 46 N.E. 381 (1897); Louisville & N.R. Co. v. Taylor, 138 Ky. 437, 128 S.W. 325 (1910); City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N.E. 992 (1913).

[2] 46 C. J. 651, par. 12.

[3] Ingmudson v. Midland Continental R.R., 42 N.D. 455, 173 N.W. 752 (1919).

[4] Irvine v. City of Oelwein, 170 Iowa 653, 150 N.W. 674 (1915).

[5] Garcia et. al. v. Sumrall et. al., 58 Ariz. 526, 121 P. (2d) 640 (1942); Hotelling v. Walther, 169 Or. 559, 130 P. (2d) 944 (1942).

[6] White v. St. Louis Post Office Corporation, 348 Mo. 961, 156 S.W. (2d) 695 (1941).

[7] Prosser on Torts, page 579, par. 73 (1941).

[8] Walsh on Equity, page 151, par. 30 (1930).

A person whose property is thus affected might have an election to ask for damages sufficient to place him in status quo, or for a mandatory injunction ordering restoration of the property to its former condition.[9]

A fine distinction between continuing tresspass and nuisance does not exist. The terms are used interchangeably but only to the extent that a continuing tresspass is a nuisance. JEROME J. DORNOFF

Torts — Duty of Business Proprietor to Customer for Safety of Premises — Plaintiff entered the defendant's restraurant for a midday meal and immediately inquired of the proprietor's wife as to the location of the restroom. Pointing to a door on the opposite side of the premises, the proprietor's wife replied, "around there". Plaintiff proceeded toward the door indicated, opened it, and fell headlong down a flight of stairs. The door was not marked and there was no sign in the restaurant indicating the location of the restroom. The trial court reasoned that there being no signs to direct the plaintiff, she assumed the risk by entering an unmarked door, and directed a verdict for the defendant. *Held:* Judgment reversed. The jury might have found that the defendant maintained a restroom on the premises as an integral part of the restaurant business and there was a general invitation to make use of it. The question of the plaintiff's contributory negligence was for the jury. *Hickman v. Dutch Treat Restaurant, 3 N.J.460, 70 Atl.(2d)764 (1950).*

Unquestionably, the plaintiff in the principle case, being a business visitor, was an invitee.[1] The invitor owes an affirmative duty to protect the invitee not only from dangers of which he knows, but also against those dangers which he might discover through the exercise of reasonable care.[2]

While it is uncontroverted that the customer of a store, while in the store proper, is an invitee,[3] the perplexing question is 'at what point does the status of an invitee change to that of a licensee, and

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[9] Irvine v. City of Oelwein, supra, note 4; Huber v. Stark et. al., 124 Wis. 359, 102 N.W. 12 (1905).

[1] Boneau v. Swift & Co., (Mo. App.), 66 S.W. (2d) 172 (1934). A person is an invitee if on the premises for a purpose connected with the business of the owner or occupant. For other definitions of 'Invitee' see also Words & Phrases.

[2] See Prosser on Torts, p. 635.

[3] Lyle v. Megerle, 270 Ky. 227, 109 S.W. (2d) 598 (1937). It will be noted in the principal case that the court dispensed with the issue of the unmarked door in this wise: "The fact that the unlocked door was not marked as the entry to the restroom is not in itself conclusive; there was no sign contrariwise and it is reasonably inferable that it was the door which the plaintiff believed (the proprietor) had indicated as the entry to the restroom." It would appear from this that a business visitor has the right to rely upon the words of the proprietor in place of a sign. But it would appear that such an invitation must be construed in the light of the nature of the business. Cf. Ftn. 11, infra.