Comments

THE OUTMODED DISTINCTION BETWEEN LICENSEES AND INVITERS*

INTRODUCTION

The distinction between invitees and licensees should be abolished. Substituted therefor should be one uniform duty of care, under which conduct of the occupier of the premises to all persons thereon should be tested under the general principles of negligence to determine whether he acted as an ordinary reasonable

*This comment is an outgrowth of the Junior Case Club final argument on Law Day, April 27, 1956, University of Missouri School of Law, in which John (186)
and prudent man would act under the same or similar circumstances. Determination of the occupier’s liability would depend upon the magnitude of the risk of harm, its foreseeability, and the means and opportunity available to avoid it.

So bold a proposal necessarily presupposes an inquiry not only as to the present soundness of the legal distinctions, but also necessitates an inquiry with respect to their social, historical and legal development.

I. HISTORY AND BACKGROUND OF THE DISTINCTION

The underlying legal theory and social objectives of the Nineteenth Century under which the Anglo-American theory of fault originated and developed are substantially different from that of the middle Twentieth Century of today. This Nineteenth Century idea was that freedom of contract, enterprise, and unrestricted uses of property were uppermost over human welfare. This philosophy was well adapted and a natural outgrowth to serve the economy of that time, an age of extreme economic individualism, industrial expansion and unrestrained exploitation of human and natural resources. This was an age which had not overthrown the feudal principle that an owner is sovereign on his own property.

The first significant case exemplifying this Nineteenth Century philosophy was Southcote v. Stanley.¹ The court in effect held that a social guest, no matter how cordially invited or requested to come, is nothing more than a licensee and there is no obligation to make the place safe for him. Pollock, C.B., placed the visitor on much the same footing as a servant. The learned judge said, in effect, that as long as the visitor is upon the premises he is in the same position as any other member of the establishment, and he is required to take his chances with the rest. Bramwell, B., thought the occupier could only be liable for acts of commission as opposed to acts of omission. He said, in effect, that the declaration merely stated a want of care and that, therefore, the action was not maintainable.

In a comment on this period and the Southcote case, Marsh said,

At that time the privileged position of the landowner was taken for granted, whereas the principle that a man should be responsible for

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¹. 1 H. & N. 247, 156 Eng. Rep. 1195 (1856). The defendant was the owner of a hotel into which he had invited the plaintiff to come as a visitor, and in which it was necessary for the plaintiff to open a large glass door in order to leave the hotel. When the plaintiff opened this door a large piece of glass fell from the door and wounded the plaintiff. The court held that the facts disclosed no cause of action against the defendant hotel owner.
damage which he ought reasonably to have foreseen was, as a general principle, inconceivable and only hesitatingly recognized in a limited number of cases. . . . It is sometimes too readily assumed that these different categories constitute a working solution of a conflict between modern social values and that therefore the observations of mid-Victorian judges with regard to them may still be accepted. This danger is all the greater in a system where the doctrine of stare decisis prevails.  

The last century in which the Southcote opinion appeared was also notably an era of privileged landowners. "The courts lost sight of the fundamental difference between (a) changing the law relating to the ownership and transfer of lands, and (b) laying down a rule governing the care in maintaining premises on land." "It was inevitable, perhaps, that the English courts of the last century, troubled with the problems of working out the new principles of negligence law, should have made the mistake of tying fault doctrine into real property law and theory."  

Not only did the sanctity of property influence the distinction between licensee and invitee, but this area of law was also influenced by the attempt on the part of the English judges to extend certain existing principles of law in regard to visitors to property. Essentially the process was one of drawing from the following four areas of the law:

1. The law relating to nuisances on the highway.
2. Contractual analogies.
3. The law relating to frauds.
4. The difference between acts of omission and commission.

To illustrate that which is referred to as the contractual analogy, it is pointed out by Marsh that if the entry upon land is by virtue of contract or in some measure involved the consent of the occupier, the latter might well be subject to liability if he did not show reasonable care. From this proposition, Marsh points out, it seemed to follow that the liability could be negatived by a contrary agreement, express or, as in the master-servant relationship, implied. It is further suggested that the parties to the agreement had to be assumed to be on an equal footing, whether or not the visitor was in fact under economic or social necessity to visit the premises. Then, too, it appears there must be a quid pro quo element in the occupier-visitor relationship. Another factor deduced from the contractual analogy was that mighty fortress, privity. It is only in recent times that the walls of this legal concept have begun to crumble to the trumpeting of Twentieth Century thinking. We also see that the Roman and Continental law of contract, which imposes a different measure of liability on

4. James, Duties Owed to Trespassers, 63 Yale L. J. 144, 146, 151 (1953).
5. This process is set out by Marsh in his article, The History and Comparative Law of Invitee, Licensee and Trespasser, 69 L. Q. Rev. 182 (1953).
the gratuitous lender from that which it imposes on the bailor for reward, might be applicable to the English law of occupier's liability. Finally, it is pointed out that a scale of duties imposed on the occupier commensurate to the degree of his consent could not take into account those visitors who had entered legally and yet without the consent of the occupier. Marsh, concluding the main body of his article, says:

Yet, as has been argued in an earlier article, wherever the law requires a duty of care as a prerequisite to liability in negligence, it is implied that new duties may be created in new circumstances. Indeed, the main argument against generalising the duty of care is that the courts should be able to consider each duty situation as it arises. Even if in the nineteenth century it was held on particular facts that in the absence of an act of commission there was no liability, a duty may nevertheless arise in the very different social and economic conditions of a century later.°

Marsh adds in the final conclusion of his first article:

The limitation inherent in the principles set out (the extension of liability by the four main methods discussed) have today no necessary relevance to (although they have in fact been allowed to prejudice) the question: "How far should an occupier be liable in negligence for injury suffered by visitors to his property?" 10

Earlier in the same article, Marsh comments that by determining liability solely by extending legal doctrine, "... it was easy to fall into one of the common fallacies of legal reasoning, namely, that if liability cannot be established by a certain legal principle it cannot be established at all." 11

There have been others as well as Marsh who have criticized the method of setting up separate categories for visitors to land.°

At this point it is important to note that it was not until well after the decision in Southcote v. Stanley 10 that what we refer to today as the general principles of negligence began to take shape. It was not until 1883 that Brett, M.R., afterwards Lord Esher, made the first attempt to state a formula of duty. In the case of Heaven v. Pender; 13 the then Master of the rolls said:

Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use the ordinary skill and care to avoid such danger.

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6. Id. at 98.
7. Id. at 199.
8. Id. at 186.
11. 11 Q.B.D. 503, 509 (1883).
Even Lord Esher recognized this formulation as being too broad, but it was not until 1932 that the English judges, under the pen of Lord Atkin, in Donoghue v. Stevenson, made a better attempt at stating the principles involved. For it was in the last cited case that the "legal neighbor" idea found expression in the law of torts, Lord Atkin saying:

The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, "Who is my neighbor?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called in question.

On this side of the Atlantic the American jurist and lawyer struggled to give definition to this matter of duty, and it was not until 1928 that Mr. Justice Cardozo (then Judge Cardozo of the New York Court of Appeals) fashioned his "unforeseeable plaintiff". That was in the case of Palsgraf v. Long Island R.R., a case too familiar to the student of American Jurisprudence to be detailed here.

As an example of the movement toward generalization and away from strict concepts of status and relative standards of care, we find expression in other fields of law characterized by development of the rules of bailments.

Bailments for many years were put into three classes with a distinct standard of care for each. It is noted in Corpus Juris Secundum that:

... there is a modern trend of decisions to discard the distinction between bailments with respect to the degree of care required of the bailee and to make the bailee simply liable for negligence, which is defined as the failure to exercise a care commensurate to the hazard, that is, the amount and kind of care that would be exercised by an ordinarily prudent person in the same or similar circumstances. ... 

II. DISTINCTION AS A BASIS OF CLASSIFICATION

NOT JUST, LOGICAL OR REASONABLE

At the present time the distinction between invitees and licensees rests on the idea that the licensee comes on the premises for his own purposes and the former for the occupier's purposes. Irrespective of whether or not the visitor comes as licensee or invitee, he is permitted to be there. It naturally follows that

15. 8 C.J.S. 263, § 26. A concrete example is the state of Minnesota which adopted such a view in Peet v. Roth Hotel Co., 191 Minn. 151, 253 N.W. 546 (1934).
the occupier knows of the visitor's presence. He is not oblivious to the fact that such persons may be injured while upon his premises. The legal cloak under which a person comes does not fashion a veil of foreseeability, hiding the eye of vigilance from what human considerations compel it to see. On the other hand, it follows, a fortiori, that if the visitor knows of the dangerous condition, and the risk involved, and fully appreciates that danger; or if he has facts from which such knowledge can be imputed, or if he otherwise fails to use ordinary care to discover or avoid the danger, then liability will not attach. It may be added that the danger is on the property of the possessor and is not apt to be altered or disturbed by any but the possessor. The occupier has superior knowledge or means of knowledge. The occupier may forbid the entry and thereby be free of any duty to discover hazardous conditions or to prepare for the visitor. Certainly the occupier is going to use care to discover and avoid injury to himself. Being required by law to use care with respect to those who come for his purposes, he should not be heard to complain or consider himself inconvenienced, should he be required, out of human considerations, to remedy those same dangers which will produce that same harm whether the injured person be owner, invitee or social guest.

Is the purpose of the visit, with the consent or the invitation of the occupier, a real, substantial, reasonable, logical or just reason for setting up these categories of duties to licensee and invitee? It is believed that they are not. These categories are antiquated and outdated. A review of English and American law, both cases and other authorities, in this field of the law of torts will show this to be the conclusion of others who have reflected this problem. ¹⁶

Unfortunately, the law of torts has been mixed up in dealing with the very troublesome question as to whether a mere volunteer is under any affirmative duty to use care to avoid persons with whom he has no contractual relationship. "Lack of privity", and "lack of consideration", have become synonymous with "lack of duty" in many fields of tort law, once again reflecting the hangover of Nineteenth Century concepts. But from the very beginning there have been exceptions to these propositions, and now in the mid-Twentieth century we find a strong and clearly ascertainable trend toward the imposition of liability upon general principles of negligence notwithstanding lack of privity, lack of consideration or contractual relationship.

Perhaps the "modern law" of a business visitor commenced with Paranaby

¹⁶. Reference has already been made to Marsh, The History and Comparative Law of Invites, Licensees and Trespassers, 69 L.Q. REV. 182, 359 (1953); articles are Prosser, Business Visitors and Invites, 26 MINN. L. REV. 573 (1942), reprinted and revised with other articles, in PROSSER, SELECTED TOPICS ON THE LAW OF TORTS, (1953); BOHLEN, STUDIES IN THE LAW OF TORTS (1926); Green, Landowner v. Intruder; Intruder v. Landowner, Basis of Responsibility in Tort, 21 MICH. L. REV. 495 (1923).
v. Lancaser Canal Co.\textsuperscript{22} The contractual relation was that the plaintiff paid a
toll for the use of defendant's canal. In the opinion, the court mentions: (a) the
toll paid, and (b) the use made by the public at the defendant's invitation.
Bohlen thought that the court rested its decision solely on the profit made by the
defendant.\textsuperscript{23} Once again referring to Southcote v. Stanley,\textsuperscript{10} Baron Alderson
distinguished the case there presented from the "Shop" cases by the "confused
remark" (Prosser) that the shop was open to the public, and "there is a dis-
tinction between persons who come on business and those who come by invitation."

The leading case fixing the three classes of visitors to land is Invermaur v.
Dames.\textsuperscript{26} Plaintiff, a journeyman gasfitter, was called to make repairs on de-
defendant's factory. Three categories were set up by Willes, J., which were tresp-
passer, licensee, and invitee. An invitee was illustrated by the customer at a
shop who was there on a matter in which both plaintiff and defendant had an
interest, not just "bare permission." If the plaintiff makes a purchase and later
returns to complain about his bargain, he is still there on business "during this
excessory visit, though it might not be for the shopkeeper's benefit."

Although in most cases pecuniary benefit is time and again said by the court
to be essential to an invitee status, there are numerous cases in which to find
any economic benefit to the landowner would require a stretch of the imagination
and an extension of the concept "economic benefit" beyond the limits of any real
meaning and reason; yet the plaintiff is held to be an invitee or business visitor.
A few examples of this assertion that the concept of economic benefit to the
possessor has been extended \textit{ad absurdum} will suffice. On this basis when a
building is thrown open to the public anyone who enters for reasons reasonably
connected with the purpose for which it is open is to be regarded as a business
visitor.\textsuperscript{21} Not only those who accompany customers, but also one who attends
a free lecture or meeting\textsuperscript{22} are considered business visitors. One who goes into
a bank to change a five dollar bill,\textsuperscript{23} or goes with the owner of an automobile
to get his car at a parking lot or a garage\textsuperscript{24} have all been considered business
visitors.

The English courts have been equally brazen in their attempt to find
"economic benefit" (material interest) as exemplified by the following cases,

\begin{itemize}
  \item 17. 11 Ad. & Ell. 223 (1839).
  \item 18. 44 Am. L. Rep. (N.S.) 209, 227 (1905).
  \item 20. 1 C.P. 247, 35 L.J.C.P. 184 (1886), affirmed in 2 C.P. 311, 36 L.J.C.P.
       181 (1867).
  \item 22. Davis v. Central Congregational Soc. of Jamaica Plain, 129 Mass. 357,
       1197 (1938).
\end{itemize}
to wit: *Pritchard v. Petro,*\(^5\) where a person going to a house to collect a debt was held to be an invitee, and *Stowell v. Railway Executive,*\(^6\) where a father going to a station to meet his daughter arriving by train was held to be an invitee because it was in the interest of the defendant that he should help his daughter with her luggage. Yet, in *Fairman Perpetual Investment Building Society,*\(^7\) where a flat was let to a tenant by landlords who remained in occupation of a staircase forming the means of access to the flat it was held that a person (a lodger) using the means of access was as to the landlords a mere licensee. We might *quaere* as to whether or not the premises might have been let at all without the right of access and whether some part of the rent might not be attributable to such right. Thus we see the confusion brought by the necessity of relying on the antiquated distinction between licensee and invitee.

A look at some very recent English cases readily reflects the discredit that has attached to the "straightjacket" approach that is here under attack. Let us look first to the case of *Hawkins v. Couledon and Purley.*\(^8\) The plaintiff was the guest of a tenant and in leaving the premises fell because a portion of the common steps crumbled. This was a defect of which the landlord had had notice. The lower court found the defendant liable and the court of appeals affirmed. Denning, L.J., seemed to indicate that the main point upon which a licensor's (guest of tenant is licensee as to landlord in England with respect to common passageways) liability turns is actual knowledge, not acts of commission or omission.\(^9\)

In *Dunster v. Abbot*\(^10\) a solicitor came upon defendant's premises but was unsuccessful in selling his product and in leaving was injured. The solicitor was held to be a licensee but the case was actually decided on broad principles and defendant was absolved of liability because he had used care commensurate with the circumstances.\(^11\)

25. [1917] 2 K.B. 143.
29. Lord Justice Denning said: "In the result, it seems to me that nowadays, in the case of an unusual danger which is not obvious or known to the visitor, it can be fairly said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage. The duty is not to invitees as a class, but to the very person himself who is lawfully there. What is reasonable care in regard to him depends on all the circumstances of the case. The relevant considerations include all those facts which could affect the conduct of a reasonable man and his decision on the precautions to be taken. . . . Much depends therefore, on the nature of the land, such as whether it is wasteland or a private road. Much depends too on the position and nature of the danger. . . . the circumstances vary so infinitely that no specific rules can be laid down."
30. 2 All. E.R. 1572 (1953).
31. Denning, L.J. said, "A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business
In Slade v. Battersea & Putney Group Hospital Management Committee, plaintiff had paid a visit to her husband who was a non-paying guest in the state hospital. She had been told to come for the reason that her husband was critically ill. While thus on the premises she slipped and fell on a floor upon which polish had recently been applied but not polished off. The court held that plaintiff might properly be considered an invitee but that even if she were a licensee she could recover on the basis that a trap existed.

On the 16th of June, 1952, the Lord High Chancellor of Great Britain appointed a committee of eminent jurists, professors, and lawyers, and proffered the question, “Whether any, and if so, what improvement, elucidation or simplification is needed in the law relating to the liability of occupiers of land or other property to invitees, licensees and trespassers.” The findings of this committee are embodied in the Law Reform Committee, Third Report, Cmd. 8305 (1954).

In speaking of the doubts as to the validity and practical application of the distinction based on material interest, the Report states in paragraph 63:

There is a certain air of reasonableness in the conventional distinction when applied to the two simple "stock" examples of a customer entering a shop and a person allowed purely for his own convenience to take a short cut across a field. But can it rationally be maintained as a universal distinction applicable to the whole range of almost infinitely variable circumstances in which one person may come upon the premises of another? Is it really relevant to the degree or care which the ultimate arbiter matters, the hypothetical reasonable man of ordinary prudence and with ordinary regard for the safety of others, would hold to be due from occupier to visitor? Is it capable in practice of sensible application in all, or anything approaching all, actual or possible cases? In our view none of these questions readily admits of an affirmative answer.

In paragraph 73 set out on page 31 it is said:

We think... that the existing distinction between invitees and licensees based on the presence or absence of some material interest on the part of the occupier, or alternatively, on some material interest... with him, it seems rather strange that your duty towards him should be different when he comes to your door from what it is when he goes away. Does he change his colour in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.”

32. 1 All. E.R. 429 (1955).
33. It was Finnemore, J., who said: “After all, does it matter what the plaintiff was? Everybody agrees that she was properly in the ward. She had asked permission, indeed, to go in. We need not bother ourselves with what might have been the position of a trespasser. After she has gone into the ward, taking the premises as she finds them, as a licensee must, whilst she is there a wholly extraneous danger, which is no part of the property itself or of the structure, is introduced into the ward on the floor. The simple question seems to me to be, was that negligence?, that is to say, was it negligence to leave that polish on the floor when someone comes walking along without giving that person a warning.”
common to occupier and visitor, is untenable as a rational ground for fixing the occupier with a higher duty of care towards the former than towards the latter . . . Where, on the facts of the particular case, an occupier has been culpably careless and his visitor has been thereby injured, the courts have usually contrived to fix him with liability, and conversely have been able to absolve the occupier in cases where the accident could not, in popular language, fairly be said to have been his fault. But this has been done in spite of, rather than with the assistance of, the categories, which, as it seems to us, tend to embarrass justice by requiring what is essentially a question of fact to be determined by reference to an artificial and irrelevant rule of law.

The Law Reform Committee recommended appropriate legislation to abolish the distinction between licensees and invitees and substitute therefor a uniform duty of care owed by the occupier of premises to all persons coming upon them at his invitation or by his permission, express or implied.

Prosser,44 James,26 and Marsh45 have dealt with American law on this subject. There are two theories in the American decisions as to the principal differences between invitees and licensees, which have been reviewed by Prosser and James. The economic benefit theory holds that the visitor must bring to the occupier of the land some “material” benefit connected with the “business” of the possessor before he becomes an invitee. This is Bohlen’s notion and since Bohlen was the reporter for the American Law Institute, this notion of economic benefit was adopted into the Restatement of Torts. The other theory is summarized by James in his article, Duties Owed to Licensees and Invitees,46 as follows:

The invitation test does not deny that “invitation” may be based on economic benefit, but it does not regard that as essential. Rather it bases “invitation” on the fact that the occupier by his arrangement of the premises or other conduct has led the entrant to believe “that (the premises) were intended to be used by visitors” for the purpose which this entrant was pursuing, “and that such use was not only acquiesced in by the owner (or possessor), but that it was in accordance with the intention and design with which the way or place was adapted and prepared. . . .” Even an express invitation might not raise such expectation, however. This test is not, for instance, invoked in favor of social guests in the ordinary private home. It has been applied particularly when the premises were prepared for the public or a segment of it.

The invitation test became somewhat discredited among legal writers during the first part of the present century, and, no doubt, because of the influence and prestige of Bohlen (who acted as reporter), the American Law Institute rejected it in the Restatement Courts, however, have remained more hospitable than commentators to the test, and it now seems to be coming back into its own in all circles of legal thought. This is as it should be, for the test has merit and deserves acceptance because it accounts more satisfactorily than the economic benefit test for many of the actual decisions holding the plaintiff to be an invitee.

35. Duties Owed to Licensees and Invitees, 63 YALE L. J. 605 (1954).
37. 63 YALE L. J. 605 (1954).
In another part of this article James went on to say: 38

In a great number of situations, these two tests will yield the same result, but they do not overlap each other completely. The adoption of either test alone will exclude from the class of invitees some entrants who would qualify as invitees under the other test. The actual course of decisions has been towards broadening the class of invitees. It is submitted that under the prevailing rule today, plaintiff may, and should be, classified as an invitee if either the economic benefit or the invitation theory is satisfied.

James and Prosser both favor the invitation theory, and have not gone so far as to recommend the abolition of the distinction between licensee and invitee as of 1953 in the case of James and 1942 in the case of Prosser (nor in his 1955 edition of the Law of Torts). Prosser did state his "conclusion" without using the words "invitee" and "licensee." In his article, Business Visitors and Invitees, 39 he thought that with respect to premises not open to the public,

... the individual may still be entitled to protection if he enters under circumstances which give him reasonable assurance that care has been taken to make the place safe for his reception.

Professor Fowler V. Harper, author of a text on torts and Professor of Law at Yale University reexamined the separate categories of licensee and invitee in commenting upon the case of Laube v. Stevenson. 40 In referring to Guilford v. Yale University, 41 which the majority in the Laube case sought to distinguish, he said:

It is not easy, at first glance, to discover a "business visitor" in an old grad, wandering about University property at 2:00 o'clock in the morning to find a place to urinate. It may be that in some vague and general way Yale hoped to derive tangible or intangible benefits by way of contributions or good will from the plaintiff's return to the campus for his class reunion. But if this kind of economic interest is enough to turn a gratuitous or "bare" licensee into an invitee or business guest, the plaintiff's presence and help around the house and in the care of the baby in the Laube case might be thought to bring about a similar transformation.

... But now comes the major problem latent in all such cases as Laube v. Stevenson. Does the difference in treatment of so-called "licensees" whether characterized as "gratuitous", "bare" or even "naked" on the one hand and "invitees" or "business visitors" or "business guests" on the other make sense? It is admitted that this dichotomy is generally recognized in Anglo-American Tort law. But that does not put it beyond critical examination.

But when we get beyond a few obvious situations, difficult problems arise. Should it make a difference that the guest is "invited" by the

38. Id. at 612.
39. 26 MINN. L. REV. 301 (1942).
40. 137 Conn. 469, 78 A.2d 693 (1953).
41. 128 Conn. 449, 23 A.2d 917 (1942).
owner rather than the visit requested by the guest? Leading English and American cases hold that it does not. How much business interest must the occupier have in the visit to make the visitor a "business" guest? When a customer goes into a store to buy something and actually makes the purchase, the problem is easy. But how about the person who is merely "shopping" or who accompanies a friend who makes a purchase or children who accompany their parents or one who drops into a hotel or store to go to the toilet or use the telephone, or to mail a letter? And what of the worker looking for a job which he may or may not get. Then there is the problem of public officials of one kind or another, who enter another's premises, not with his permission, but because they have legal authority to do so in the discharge of their duties. Even the social guest does not fit too readily into the pattern.

If the principle involved in these cases is the reasonable expectations of the parties, in view of the relationship between them, why should not each case be treated on its own merits without arbitrary judge made rules based upon ephemeral classifications such as are involved in the licensee-invitee dichotomy? The occupier of premises should do what a reasonable person would do under the circumstances for the safety of those he knows are on his premises and those whom he had reason to expect. If they are trespassers, even though expected, that is one thing. If they come for legitimate purposes, to be sure, the occupier's interest in their presence, his willingness to have them there, the particular nature of their purpose, and many other factors may enter into proper consideration. When a man invites his mother-in-law or his neighbor or his business associate to his home, he knows that their safety is, to a point, in his hands. He also knows that, without an invitation, the postman, the tax assessor and perhaps a policeman or fireman may have occasion to come on to this property. Perhaps he should be required to keep his premises as safe for the one group as for the other. And perhaps he should be required to keep them reasonably safe for all.

The suggestion here made is not altogether new. Students of the law of torts have in recent years become increasingly dissatisfied with the apparently simple rule of thumb involved in the gratuitous licensee-business guest categories, recognizing that in the infinitely variable situations in which one man may have occasion to go on to another man's land, the rule of thumb just does not work because many cases will not fit into either category or it is touch and go which one it fits the best. . . .

Reducing the emphasis on the licensee-invitee classification, abandonment of the attempt to fit every case into the one or the other on the basis of business interest and leaving to the jury, wherever possible the issue whether the conduct of the defendant has conformed to the plaintiff's reasonable expectations in the light of their relationship and all the other pertinent facts of the case would, it is believed, lend far greater elasticity to the law of torts. It is submitted that this is a wholesome development and that the tendency is in that direction. . . . 42

Much has transpired since that day in 1855 when counsel for the plaintiff in Southcote v. Stanley 43 told the court:

42. 25 CONN. B. J. 123 (1951).
The declaration shows a duty on the part of the defendant, and a breach of that duty. It is immaterial whether the injury takes place in a place in a private house, or in a shop, or in a street; the only question is, whether the person who complains was lawfully there. . . .

Whether it be a private house or a shop, a duty is so far imposed on the occupier to keep it reasonably safe that if a person lawfully enters, and through the negligence of the occupier in leaving it in an insecure state, receives an injury, the occupier is responsible.

In speaking of the distinction between a social guest and an invitee it was said by Sir Fredrick Pollock, many years ago,

Why in common reason should a person invited for the occupier's pleasure be worse off than one who is about business concerning them both.44

III. A BOLD NEW STEP LONG OVERDUE SHOULD BE TAKEN

We have seen that the "status" requirements of liability were formulated in an era far removed from our own. We have seen that other areas of the law were drawn upon and left their mark, for better or worse. We have noted that the formulation of the basic principles of negligence followed rather than preceded the classification of entrants for purposes of liability. We have seen this citadel of another era under siege by the most eminent of legal writers and jurists. We have seen that the current trend is to cast off the traditional immunities of the occupier to entrants on his land and to substitute therefor the basic law of negligence. Of the many voices we have heard, we add one more. Lambert, in Recent Important Tort Cases,45 states that

Occasionally, this beating of the law of negligence at the gates of the occupier's immunities has been by Cyclopean blows; more often, in the fashion of the common law, it has been by a process of erosion—a quiet nibbling away at the immunities. Stemming originally from feudalism and a sanctification of the rights and privileges rooted in land ownership, the common law classified all entrants into more or less exact categories, such as trespasser, licensees, invitees, etc. and fixed variant obligations owing by the occupier to the entrant, depending upon his place in the hierarchy of entrants. The common law thus achieved what at first blush might seem to have been a triumph of classification and organization. But the triumph depended upon swallowing up into a formal scheme of classification many of the living issues of the law of torts, such as; in the light of the general security, what obligation of care should be owed by occupiers to entrants injured either by activities or conditions on the land? The solution of such questions should depend on judgments about objectives of tort law in this area, rather than upon mechanical rules assigning entrants to categories.

We have seen some jurisdictions in an attempt to differentiate the categories, looking for that vague and nebulous factor called "pecuniary benefit." Others

44. Pollock, on Torts 697 (14th ed. 1939).
have placed emphasis on the nature of the invitation, and that indeed is a word fraught with infirmities.

In England the strict adherence to the rule of stare decisis precludes the "cyclopean blow" on the part of the courts. Their authorities and jurists have come hard upon the gates of the occupier's immunities, the rest must be left to legislative reform. The American jurisdictions may choose, in the light of precedent, to allow but a "nibbling away" at the immunities, but are in a position to abolish them in one great sweep by decision.

We should not content ourselves by following precedents from another age foreign to our own. Let us abolish the distinctions. Let us substitute therefor a uniform duty of care with respect to all who find themselves lawfully on the premises. Let us then ask of our juries the following question: "Could an ordinary, reasonable and prudent man, under the same or similar circumstances, standing in the shoes of the defendant, foresee a risk of some harm to the particular plaintiff?" If he could, a duty arises to use that care which the ordinary, reasonable and prudent man would use under the same or similar circumstances. All the circumstances surrounding the visitor's presence should be taken into account. We should also take into account such factors as (1) the magnitude of the risk, (2) the nature of the premises, (3) the activities thereon conducted, (4) the type of defect involved, (5) the ease of rectifying or warning of such dangers, and (6) the occupier's and the visitor's knowledge of the danger.

CONCLUSION

This comment has shown that the usual method of answering the question of what duty the occupier of land owes to visitors thereon is, first, to see what was the status of the visitor. After the status is determined then it is ascertained what duty is owed to persons having this classification, and then to see if there are any qualifications or exceptions. These status classifications are trespasser, licensee and invitee. The origin of these status classifications is Indermauer v. Dames.46

This antiquated and now baseless system of classification has produced little more than confusion, conflict, and a multitudinous conglomeration of qualifications and exceptions to each category and classification. This doctrine has been shown to be an outgrowth of the Nineteenth Century with its concepts and social doctrines completely foreign to our own Twentieth Century. It seems especially appropriate in view of this background to rid ourselves of this useless and confusing system and make a fresh start in principle with our modern day and age.

46. 1 C.P. 274, 35 L.J.C.P. 184 (1866), affirmed 2 C.P. 311, 36 L.J.C.P. 181 (1867).
The sovereignty of the landowner no longer can be unlimited. There are human rights to consider as well as property rights. That concept is what our present day democratic society is built upon and from which it derives its strength. To reject it now would seem inconceivable. The law must and does in most areas realize that in personal injury and death, society suffers a loss as well as the injured and those who love them and are dependent upon them.

Humanity, logic and justice require that the law ask no less than that the defendant should meet the ordinary standards of due care under the particular circumstances. These general principles of negligence have been engendered into the American law. They serve as the basis for those cases which test liability by determining whether the defendant has acted as an ordinary reasonable and prudent man would act under the same or similar circumstances. That rule should be extended to the field of land-visitor cases.

_Stare decisis_ is not an ironclad rule which requires an outdated concept to be surrounded by a wall of fire making it unapproachable to the growth of the law. The very strength of the common law has been in its ability to expand and meet the demands of the age. It is submitted that the demands of our modern society and of human consideration call for the abolishment of the distinction between licensee and invitee and to be substituted therefor one uniform duty of care, under which the conduct of the occupier of the premises to all persons thereon should be tested under the general principles of negligence to determine whether he acted as an ordinary reasonable and prudent man would act under the same or similar circumstances.

CHARLES P. DRIBBEN

**The Property Concepts of Copyright Law**

The transition from legal theories and concepts to a practical and efficient instrumentality with which jurists can effect appropriate ends holds a failing which is common to all human systems that are predicated upon the transformation of abstract ideas into meaningful words: a mutation takes place, causing the idea to lose its original form. This mutation has been so severe in the field of copyright law that there has arisen a difference of opinion as to what concept of law should serve as a base for the formation and interpretation of laws applied to literary and musical creations. The problem has been adeptly evinced by Luther H. Evans in his treatise, "Copyright and the Public Interest".1

The diversity of juristic concepts as to the true basis of copyright has impressed many students of the subject. This has complicated efforts

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1. Evans, _Copyright and the Public Interest_, 53 _BUL. OF N.Y. PUBLIC LIBRARY_ 5 (1949).

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*This comment was prepared originally for the Nathan Burkan Memorial Competition.
at agreement on definition and statements of principle not only in the international field but has also retarded the solution of pressing practical problems of detail in the domestic law of various countries. Adherents to the view that the right of an author to control, even after publication, the copying or reproduction in any form of the creation of his intellect is a property right essentially identical to that in a physical object moulded by an artisan with his hands or to a crop taken by a farmer from his soil, find it difficult to reconcile themselves to the thinking of those who assert copyright to be a privilege granted by the state for a limited duration in the public interest. Others deny the validity of either of these views and contend that copyright can only be adequately understood as in essence the extension of the creator's personality; that is, as an application of the doctrine of the right of privacy. On other occasions copyright has been spoken of as one of those natural rights more popular in a day of earlier political debate of which we may today be witnessing a revival as we hammer out codes of human and civil rights for universal acceptance.

An analysis of each of these concepts leads to a simplification of the issues upon which they differ and may ultimately produce a reconciliation of the conflicting views.

The narrow line of cases which offer relief to writers through application of the right of privacy doctrine apply this doctrine to such a limited field that there can be no serious contention that such an approach carries much influence on the broad area covered by copyright law. This doctrine has been used to protect the writer of private letters against unjustifiable publication. While this protection has predated the accepted birth of the "privacy doctrine" by more than a century it bears such a close resemblance to the actions protected by the latter that it has been summarily placed within that category of the law. In the words of Lord Campbell:

A Court of equity will grant an injunction to prevent the publication of a letter . . . That is a recognition of property in the writer, although he has parted with the manuscript: since he wrote to enable this correspondent to know his sentiments and not give them to the world.

The words of Lord Eldon show the doubt (in the validity of the property interest of a writer in his correspondence) which later led to discard of this property theory in favor of the privacy theory:

... the sender of the letters has still that kind of interest, if not property, in the letters that he has a right to restrain any use being made of the communication which he has made in the letters so sent by him.

2. The doctrine of the right to privacy is said to have begun in 1890. See Brandeis & Warren, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). A number of cases had been cited as early as 1769 giving a writer an interest in his work; Millar v. Taylor, 4 Burr. 2302, 2379, 98 Eng. Rep. 201 (1769).


Beyond the application to private correspondence and personal diaries there seems to be no real reason to base copyright upon the doctrine of privacy. The greatest portion of copyrighted work is intended to be published, not hidden away; the protection sought is against unauthorized publication by others who seek profit, not the restraint of publication of private communications. Copyright protection should be granted the writers of private letters, but the entire field of copyright does not base its origin upon the doctrine of the right of privacy.

In order to understand the theory that finds a basis for copyright in property law it is first necessary to dispose of a number of misleading phrases which confuse the main issues. Foremost among the misleading terms is "literary property."

The word "copyright" and the phrase "literary property" are not generally considered to be synonymous. The latter phrase has a more general significance than copyright and includes both the right which the producer of an intellectual production has therein by common law, and the right which he may obtain under the copyright statutes; it is a general term which describes the interest of an author or proprietor in an intellectual production whether before or after the publication, or before or after copyright.5

Common law copyright gives an author of a literary work the exclusive right to the first publication of his work. Once the work is published the common law protection is lost.6 Statutory copyright protects the author or his successor against infringements only if he has obtained the copyright but does not infringe upon the common law copyright.7

Advocates of the property concept propose that literary works are things which can be owned and possessed and that statutes are merely means of protecting the property interests of the owners. This property takes on two characteristics: It is corporeal property in the sense that the author has a property right in the manuscript as much as he might have a right in any other tangible personal property. Further, there is an incorporeal property carrying a "power to determine whether the work shall be published at all, the manner in which, if published, it shall be done, and to whom."

Under the federal statutes a copyright is distinct from the property or material object copyrighted and the sale or conveyance by gift or otherwise of the material object will not of itself constitute a transfer of copyright.8 Furthermore, at common law mere possession of the manuscript does not give copyright

protection. Thus the manuscript is like any other tangible chattel and is governed by the laws of property.

Now that the collateral matters have been eliminated it is possible to proceed with the question: what is the true basis of copyright law?

It cannot be denied that our present system of copyright law is governed by federal statutes. However, there has been a continual reference to what I term a "hybrid property." Mr. Justice Holmes in his concurring opinion in White-Smith Music Publishing Co. v. Apollo Co. points out the hybrid qualities:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.

The arguments which contend that copyright is a property right which is protected by statute are based on the common proposition that the law is devised to protect the author. Property law developed to cope with the materialistic nature of man's relationship with his fellow man. That each man should be permitted to profit by his own labor is a proposition that runs to the very keystone of our society. In this sense property rights and "natural rights" are manifestations of the same basic concept and differ only in that the property concept is less intangible approach to the practical problems which arise. The contention that copyright is property is in accord with one of the two greatest conflicting purposes of copyright law:

The major purposes of the Copyright Act are to secure to the author, or his successors in interest, a monopoly more or less in the nature of a reward for his genius and industry, as well as for the encouragement of others, and to give notice to the public that the author has not abandoned his work or dedicated it to public use.

Another attack against the proposition that copyright is purely statutory is based upon the contention that the statutes are merely an extension of the undeveloped but contemplated common law.

10. Chamberland v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1950). But note, Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159 (2d Cir. 1927) holds that adverse possession of the manuscript is prima facie evidence of title and presumptively includes all of the rights recognized by common law.
12. See quotation in text supporting note 1 supra.
13. Pearson v. Washingtonian Pub. Co., 98 F.2d 245 (D.C. Cir. 1938). The quotation actually relates to but one general purpose, that is, to benefit the author as opposed to benefiting the public.
... those who have maintained that literary property has no foundation but in the municipal code, have drawn most of their arguments against it from the naked laws of nature, without perceiving, or without choosing to perceive, that it may derive its existence from those broad and comprehensive principles which govern the relations of man in society, and which, although they have originated in the merely natural rights of man, extend their foundations to the support of his social condition.¹⁴

However, the great weight of authority has favored the approach which defines copyright as a purely statutory privilege granted by the government. Historically copyright has been dominated by statutes. The Constitution serves as a base for our law in the United States, setting out in Art. I, sec. 8: "Congress shall have the power . . . (8) To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It would appear that the constitutional provision was aimed not at the protection of the author, but at the ultimate goal of benefiting the public. But may the question be raised that these words are but a pedantry born of the occasion, or whether the framers of the Constitution were recognizing the confusion and injustice to authors and inventors which had resulted from the conflict of separate copyright and patent laws of each colony? Certainly if one were bold enough to question the manifested intentions of the framers it might be pointed out that a great many of the provisions of the Constitution were intended to reconcile the conflict of laws of the colonies.

However, the deeper question is whether the Constitution created a right or merely recognized and sought to modify and protect a pre-existing property right or natural right. An outstanding British text writer points to a distinction which is equally applicable to U. S. copyright law:

It has, nevertheless, become a matter of frequent controversy whether copyright is a natural right, or one entirely dependent upon statute. If it were a natural right, then the period of protection ought logically to have been unlimited.

Pointing out the limited duration and requirement that statutes be complied with, he concludes: "Copyright, therefore, at the present day is, in those parts of His Majesty's dominion to which the Copyright Act 1911 applies, purely a statutory right."¹⁵

Mr. Justice Holmes suggested the same theory in White-Smith Music Publishing Co. v. Apollo Co., supra.

... It is a right which could not be recognized or endured at common law for more than a limited time and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

However, the test is not a convincing one. A lease by the United States of land to a tenant for years would not cause the interest of the tenant to be

¹⁴ Curtis, A TREATISE OF THE LAW OF COPYRIGHT 3 (1847).
¹⁵ Copinger, LAW OF COPYRIGHT 3 (7th ed. 1936).
something other than what is termed property in the land merely because it would cease in a limited time. The time limits of copyright have long been controverted. If copyright is property, the withdrawal of protection of the property interests by the government would not destroy the property qualities but only the utility of the property to the author.

A more tenable argument might be premised upon the theory that rights which are recognized by statute and not created at common law are statutory rights regardless of the underlying reasons for the enactment of the statutes. "Copyright is an intangible right, unknown to common law, creature of statute, and possessing only characteristics with which statute has endowed it."16 But even if the underlying reasons for the enactment of the statute were significant, it is argued that:

Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people in that it will stimulate writing and invention to give some bonus to authors and inventors.17

Under the statutes copyright may be regarded as a form of franchise or privilege granted by the government to a person who has exercised his abilities.18 But the real difficulty lies in the fact that this franchise need not remain in the author, for he may dispose of it like property. "It is property in the sense that it has commercial value and may be sold as other property, but it is not an article of commerce in the sense that it may be consumed by the purchasing public."19

Under the Act a copyright may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or it may be bequeathed by will.20 These acts are normally thought of as property transactions. Presumably a will which would not be valid to bequeath tangible property would likewise not be valid to bequeath a copyright. To this extent copyright must be governed by the laws relating to matters of property. The argument that Section 28 of the Copyright Act, supra, could be repealed and the rights granted under it destroyed is a purely academic one; destruction of such rights would decrease the value of the copyright greatly and in many cases destroy the incentive of authors.

Therefore, the concepts of property must play an integral part in the interpretation and application of copyright law, regardless of the theory accepted as a basis for the law. In view of the need for the property concepts, they should not be construed as conflicting with the theory that copyright is statutory, but rather the two should be coordinated to achieve the best results.

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