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there were unchangeable ideals which had a more stable foundation than the shifting sands of public opinion.⁴⁸

Contemporary legal scholars such as Mortimer Adler,⁴⁹ Harold McKinnon,⁵⁰ Ben Palmer⁵¹ and Clarence Manion⁵² have expressed belief in ultimate truth. They are the foremost advocates of the only contemporary school of jurisprudence which is founded upon a belief in absolutes. This philosophy is generally referred to as Natural Law.⁵³

It will be seen that competent authority exists for maintaining that morality is an unchanging, absolute, ascertainable standard of conduct. If such a rule were to be applied to concrete cases, would the maze of contradictory decisions in this field disappear? No one can say for sure. If a constitutional phrase like "freedom of speech" is subject to so much doubt and dispute, it cannot be hoped that a God-given directive to do good and avoid evil⁵⁴ will cause any less consternation. Nevertheless, such broad standards are at least a foothold⁵⁵ upon which men of intelligence and goodwill can build a reasonably stable body of law.

EXTENSION OF LIABILITY OF STOREKEEPERS TO THOSE RIGHTFULLY UPON THE PREMISES

Sometimes when examining a rule of law which has remained stable for a number of years one finds that, although the rule has remained the same in its expression, a change has occurred in its application. Such a change seems to have taken place in the cases dealing with the liability of storekeepers and proprietors of shops to those rightfully upon their premises.

⁴⁸ Declaration of Independence, Preamble.

⁴⁹ Authority cited note 46 supra, at 65.

⁵⁰ Authority cited note 2 supra.

⁵¹ Palmer, Reply to Mr. Charles W. Briggs, 32 A.B.A.J. 635 (1946).

⁵² Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutions*, 35 A.B.A.J. 461 (1949).

⁵³ "In the beginning God, acting with Supreme Intelligence, created all things according to a Divine Plan. That Plan is the Eternal Law. Man, endowed by his Creator with an immortal soul, an intellect and a free will, can ascertain the primary dictates of the Eternal Law by his own reason, apart from direct Revelation. Such dictates thus made known, together with the inferences flowing rationally from them, constitute the Natural Law." 3 *Natural Law Institute* 1 (1949).

⁵⁴ Authority cited note 46 supra, at 71.

⁵⁵ The problem of deciding just what the moral law prohibits is not too great an obstacle. Authority cited note 51 supra, at 636; Wilkin, *Natural Law in American Jurisprudence*, 24 *Notre Dame Lawyer* 343, 361 (1949). Already tax statutes have been examined in the light of Natural Law. Peters, *Tax Law and Natural Law*, 26 *Notre Dame Lawyer* 29 (1950). Other perplexing problems have been treated also. Rommen, *The Natural Law*, c. XIII (1948); Cobban, *The Crisis of Civilization*, c. X (1941); Maritain, *The Rights of Man and Natural Law* (1947); Sterilization, 33 *Marq. L. Rev.* 78 (1949); Euthanasia, 33 *Marq. L. Rev.* 133 (1949); Divorce, 32 *Marq. L. Rev.* 295 (1949).

When Mr. Jones, the storekeeper, opens his shop in the morning there is the possibility that many different types of people might enter during the day. Mrs. Adams, a customer, might enter with her small child, Jimmie. Mr. Black might come in to "shop around." Others might enter to take a shortcut, to accompany a customer, to use a telephone or to use a sanitary facility. There is always the possibility that some unsafe condition on the premises caused by Jones' negligence or that of his employees may result in injury to any one of these people. Mr. Jones may well wonder, "What are my chances of liability if one of these persons is injured? Am I liable to every one of them?"

The rule is simple—Mr. Jones is liable for ordinary negligence to those to whom he owes a duty of ordinary care. If the person injured is a licensee no such duty is owed; if he is an invitee there is such a duty.

It is well settled that Mrs. Adams, the customer, is an invitee¹ as long as she remains in the part of the store serving customers.² Proprietors of stores,³ restaurants,⁴ filling stations,⁵ and any other type of business open to the public recognize this liability as a matter of course. The same holds true of Mr. Black, the prospective customer who is just "looking around."⁶

The difficulty arises in the other situations mentioned, and it is in trying to fit these people into the proper category that we find a significant change in the attitude of the courts. People who at one time would have been considered mere licensees are increasingly recovering for their personal injuries as invitees.

The early view appears to have been that only those who actually had some *business* on the premises—that is, purchasing or negotiating—were invitees. An early New York decision⁷ held a man crossing defendant's premises merely for his own convenience in reaching another place to be simply a licensee. The case gives no reasons for its holding but has been quoted to show that one taking a shortcut across business premises is not a business visitor.⁸

¹ Cases are collected in Prosser, Torts 635-6 (1941).

² The limitation on premises used brings up the "area of invitation" limitation found in Rest., Torts § 343, Comment b (1934). By its application, those on the premises, even invitees, are mere licensees when they go upon portions not normally open to the public. Although the scope of this note is primarily concerned with the effect of the purpose of the plaintiff in entering the premises in the first place, it will be necessary to refer to the "area of invitation" limitation several times in passing.

³ Dudley v. Montgomery Ward and Co., 64 Wyo. 357, 192 P. 2d 617 (1948).

⁴ Noack v. Wosslick, 182 Ill. App. 425 (1913).

⁵ Standard Oil Co. v. Burleson, 117 F. 2d 412 (C.A. 5th, 1941).

⁶ Thompson v. B. F. Goodrich Co., 48 Cal. App. 723, 120 P. 2d 693 (1941); Meyer v. Manzer, 179 N.Y. Misc. 355, 39 N.Y.S. 2d 5 (S. Ct., Oneida County, 1943).

⁷ Rosenthal v. United Dressed Beef Co., 52 N.Y. Misc. 166, 101 N.Y. Supp. 532 (S. Ct., 1906).

⁸ 45 C.J., Negligence § 194 (1928).

At one time a child in a store with his mother was not considered a business visitor even though the mother was in the store to make a purchase.⁹ The theory was that the child had no existing intention to trade. A storekeeper was held not liable to a friend accompanying a customer because it "cannot be said they [merchants] invite the entrance of those who accompany them [customers] but who had no intention to purchase."¹⁰

Another early case held that a man entering a tavern for the sole purpose of using a washroom was a licensee and remained one even though friends already in the place treated him to drinks before his injuries.¹¹

The rule to be inferred from these early cases is that a storekeeper owed a duty of ordinary care only to those on the premises to buy. A person was a mere licensee unless some monetary profit to the storekeeper did or would directly result from his presence.

In 1934 the *Restatement of Torts* appeared. It kept the old forms and made "business dealings" the test.¹² In its comments and illustrations, however, it expanded the area of plaintiff recovery. For example, one taking a shortcut across business premises and a child with his parent or nurse are declared to be business visitors.¹³ There were cases holding a more liberal view as to recovery before the *Restatement*, but since its publication it has been quoted as a justification for such liberality of recovery in an increasing number of cases.¹⁴

In a recent case, *Renfro Drug Co. v. Lewis*, a plaintiff entering a drug store for the purpose of using it as a shortcut with no apparent intention to have any dealings with the proprietor was held to be an invitee.¹⁵ The court quoted the *Restatement* at length, using the possible benefit theory as the basis of its decision,¹⁶ and as a secondary grounds the theory of an implied invitation to members of the public to use the premises.¹⁷ This is a far cry from the original view that the injured person must be one from whom direct economic benefit could be expected.

The *Restatement* view that "a child taken by a mother or nurse to a shop is a business visitor irrespective of whether it is necessary for the customer

⁹ *Petree v. Davison-Paxon-Stokes Co.*, 30 Ga. App. 490, 118 S.E. 697 (1923).

¹⁰ *Fleckenstein v. Great Atlantic and Pacific Tea Co.*, 91 N.J.L. 145, 102 Atl. 700 (1917).

¹¹ *Kneiser v. Belasco-Blackwood Co.*, 22 Cal. App. 205, 133 Pac. 989 (1913).

¹² Rest., Torts § 332 (1934).

¹³ Rest., Torts § 332, Comments c and d (1934).

¹⁴ E.g., *Weinberg v. Hartman*, 65 A. 2d 805 (Del., 1949); *Hartman v. Miller*, 143 Pa. Super. 143, 17 A. 2d 652 (1941); *Carlisle v. J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W. 2d 1073 (1941).

¹⁵ 235 S.W. 2d 609 (Tex., 1950). But see *Brosnan v. Kaufman*, 294 Mass. 495, 2 N.E. 2d 441 (1936); *Baird v. Goldberg*, 283 Ky. 558, 142 S.W. 2d 120 (1940).

¹⁶ *Renfro Drug Co. v. Lewis*, 235 S.W. 2d 609, 616-7 (Tex., 1950).

¹⁷ *Ibid.*, at 617.

to take the child with her in order to visit the shop,"¹⁸ is in accord with the weight of authority. Reasons for the holding vary from jurisdiction to jurisdiction.¹⁹

Courts today have generally reached the same conclusion in situations involving those accompanying customers. In a 1928 Missouri case a plaintiff who accompanied his superior onto business premises recovered because "he might become interested in a salvaged automobile or some other attractive article."²⁰

The extension of the proprietor's liability has been irregular in the case of those entering the premises for the express purpose of using the washroom. If the person is already a customer and uses a washroom provided for customers, there is no doubt about his status as an invitee.²¹ If he is not a customer, or if the washroom is in a private part of the premises, difficulties arise. In *Low v. Ford Hopkins Co.*²² the plaintiff had not entered to purchase anything, but merely to use the washroom, and the decision was based upon this fact. It seems that the court could have reached the same conclusion by using an "area of invitation" theory, for the lavatory was only "occasionally used" by customers. If one looks only at the decision of the court, it would seem that the possibility of purchase is just as great, or the invitation to the public as wide as in the case of one taking a shortcut.

Somewhat more liberally, the Supreme Court of Kansas has held²³ that a former customer who was injured while approaching a washroom was an invitee, although he had no intention to purchase at that time. The court said that such persons might "become interested, for example, in a brand of cigars on display which they may purchase then or on some future occasion."²⁴

A telephone user also poses problems, the courts applying somewhat in-

¹⁸ Rest., Torts § 332, Comment d (1934).

¹⁹ *Weinberg v. Hartman*, 65 A. 2d 805 (Del., 1949); *Custer v. Atlantic and Pacific Tea Co.*, 43 A. 2d 716 (Munic. Ct. App., D.C., 1945); *Kremer v. Vim*, 306 Ill. App. 476, 28 N.E. 2d 811 (1940); *L. S. Ayres and Co. v. Hicks*, 220 Ind. 86, 40 N.E. 2d 334 (1942); *Milliken v. Weybosset Pure Food Market*, 71 R.I. 312, 44 A. 2d 723 (1945).

²⁰ *Kennedy v. Phillips*, 319 Mo. 573, 5 S.W. 2d 33 (1928). Accord: *Sears Roebuck and Co. v. Burke*, 44 So. 2d 448 (Miss., 1950). The same result was reached on the theory that the companion took the same status as the one he accompanied, *Meyer v. Manzer*, 179 N.Y. Misc., 39 N.Y.S. 2d 5 (S. Ct., Oneida County, 1943); *Warner v. Lacey*, 201 N.Y. Supp. 658 (App. Div., 3d Dep't, 1923). Contra: *Morse v. Sinclair Automobile Service Corp.*, 86 F. 2d 298 (C.A. 5th, 1936).

²¹ *Sheridan v. Ravn*, 91 Cal. App. 2d 179, 204 P. 2d 644 (1949); *Bass v. Hunt*, 151 Kan. 740, 100 P. 2d 696 (1940); *Main v. Lehman*, 295 Mo. 174, 243 S.W. 91 (1922).

²² 231 Iowa 251, 1 N.W. 2d 95 (1941). (Recovery denied.)

²³ *Campbell v. Weathers*, 153 Kan. 316, 111 P. 2d 72 (1941).

²⁴ *Ibid.*, at 321 and 76.

consistent theories. If the telephone is a public one liability results.²⁵ In the case of a semi-private telephone we again become involved in the "area of invitation" concept, with its limitation upon use of the non-public portions of the premises.

A plaintiff who, after making purchases, had reached the door leading out of the store, and then returned to use a telephone has been denied recovery because the transaction involved was not "connected in any way with the defendant."²⁶ The case is vague as to the accessibility of the telephone to the public, and it would seem that the court might well have arrived at the same result by using an "area of invitation" theory.

At least two telephone cases have held that an express statement that the plaintiff could use the telephone should be interpreted as an express invitation and have the result of imposing a higher degree of liability.²⁷ This contrasts with most other situations, such as those involving washrooms, in which such statements to the plaintiff are usually looked upon as mere permission, not affecting the liability of the proprietor.²⁸

The courts have, then, extended liability when the plaintiff was in the public portion of the premises. One walking through the store or accompanying another has been protected. The "area of limitation" theory still limits liability when a customer is upon the private or semi-private part of the premises. In several cases where this limitation might have been appropriate the courts have seen fit to ignore it and to decide the case purely upon the basis of purpose in entering. Express statements of permission, except in a few telephone cases, seem to bear little weight.

The test of "business dealings," once strictly construed, is still used as the main test of liability in the majority of cases.²⁹ It has been altered, though, until almost anyone upon the public part of the premises might be said to be a source of "potential economic benefit" to the storekeeper, thus extending liability beyond that found in the early cases, where essentially the same language may be found.

Perhaps the best indication of the trend is a recent Louisiana case,³⁰ not strictly dealing with storekeepers and customers, yet helpful in the in-

²⁵ *Dowling v. MacLean Drug Co.*, 248 Ill. App. 270 (1928); *Haley v. Deer*, 135 Neb. 459, 282 N.W. 389 (1938).

²⁶ *Wesbrock v. Colby*, 315 Ill. App. 494, 497, 43 N.E. 2d 405, 406 (1942).

²⁷ *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931); *Sulhoff v. Everett*, 235 Iowa 396, 16 N.W. 2d 737 (1944) overruling *McMullen v. M and N Co.*, 227 Iowa 1061, 290 N.W. 3 (1940) which had been decided on an "area of invitation" theory without regard to any express invitation.

²⁸ *Kneiser v. Belasco-Blackwood Co.*, 22 Cal. App. 205, 133 Pac. 989 (1913); *Jones v. 20 North Wacker Drive Corp.*, 332 Ill. App. 383, 75 N.E. 2d 420 (1947); *MacNamara v. MacLean*, 302 Mass. 428, 19 N.E. 2d 544 (1939).

²⁹ E.g., *McStay v. Citizen's National Trust and Savings Bank*, 5 Cal. App. 2d 595, 43 P. 2d 560 (1935); *Todd v. S. S. Kresge Co.*, 303 Ill. App. 89, 24 N.E. 2d 899 (1939).

³⁰ *Mercer v. Tremont and G. R. Co.*, 19 So. 2d 270 (La. App., 1944).

terpretation of "mutual economic benefit." A boy was in a roundhouse for the purpose of soliciting advertisements for a local paper from the superintendent (who had no authority to order such ads). His presence was not requested, there was no history of past dealings, and he was injured before accomplishing his purpose. The court held that he was an invitee saying, "[He] was engaged upon the course of a legitimate business venture which unquestionably promised benefit to himself and which held out at least potential benefit to defendant company."³¹

One of the underlying reasons for the apparent extension of liability in "invitee cases" well may be that the storekeeper actually did or did not do something which caused the damage and that it is only a matter of chance that the one injured (who was rightfully upon the premises) happened to be a non-customer. The storekeeper also seems to be in a better position to protect himself against the disastrous results of such injuries.

Although in close cases the courts talk about economic benefit and business dealings, the recent decisions would seem to be more properly based on what is often given as a secondary basis for liability; that is, an implied public invitation to enter for certain purposes, not necessarily tied up directly with profit to the storekeeper.³² This is the theory advocated by Professor Prosser,³³ which we have seen used as a supplementary basis for liability in the *Renfro* case,³⁴ and used by an increasing number of courts in the same way.³⁵ Although the practical results in terms of liability are usually the same under either theory it would seem that the theory of implied invitation is a more realistic approach to the problem.

CREATION AND EXISTENCE OF JOINT TENANCIES IN PERSONAL PROPERTY—A STUDY OF FORMALITIES AND INTENT

The creation of joint interests in personal property has become a needlessly complicated procedure. Although the intention of the parties may clearly be to create joint interests with the right of survivorship, too frequently the desired result is not attained because of an unwitting failure to comply with historical legal formalities. It is further complicated by the tendency of the courts to apply real property principles rather automatically to personal property problems.

Originally the courts favored the centralization of titles and encouraged

³¹ *Ibid.*, at 276.

³² *Renfro Drug Co. v. Lewis*, 235 S.W. 2d 609, 617 (Tex., 1950); *Campbell v. Weathers*, 153 Kan. 316, 111 P. 2d 72, 76 (1941).

³³ Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 602 (1942).

³⁴ *Renfro Drug Co. v. Lewis*, 235 S.W. 2d 609, 617 (Tex., 1950).

³⁵ Cases cited note 32, *supra*.