Torts - Duty of Possessor of Land to Business Invitees - To Licensees - Scope of Invitation

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tax the earnings of that business. In the *Penny* case, the Privilege Dividend Tax was held invalid because it was an attempt to tax a privilege granted by Delaware and exercised in New York.

JOSEPH E. TIERNY, JR.

Torts—Duty of Possessor of Land to Business Invitees—To Licensees—Scope of the Invitation.—The plaintiff entered the defendant's drugstore to make a purchase and to use the telephone. She did not make the purchase, but was invited to use the telephone, which was in the prescription room. There was evidence that customers generally were permitted to use this telephone, access to which usually could be had by reaching over the top of a swinging door at the entrance to the prescription room. This door extended to a height of about three feet from the floor. The plaintiff, because of her short stature, could not reach the telephone without pressing against the swinging door, and in doing so she pushed the door open and fell through an open trap door inside the prescription room down a stairway into the basement. This stairway was three inches from the swinging door.

The trial court directed a verdict for the defendant. On appeal, *held*, judgment affirmed, three justices dissenting. The majority regarded the plaintiff at the time of her injury as a mere licensee who took the premises as she found them and as to whom there had been no willful and wanton misconduct. *McMullen v. M. & M. Hotel Co.*, (Iowa 1940) 290 N.W. 3.

The majority opinion is based largely on two earlier Iowa cases. In the first the plaintiff's decedent lost his way and thinking that he was on a road which crossed a bridge over the Mississippi River he drove off the defendant's ferry slip and was drowned. *Printy v. Reimbold*, 200 Iowa 541, 202 N.W. 122, 41 A.L.R. 1423 (1925). In that case the deceased was at best a licensee since he was not on the premises for any purpose in which the defendant had an interest. In the second case plaintiff left his coat in defendant's store. When he returned for it, he was told by defendant's clerk to go and get it. When plaintiff entered a dark closet to get it, he fell down a stairway and was injured. *Keeran v. Spurgeon Merc. Co.*, 194 Iowa 1240, 191 N.W. 99, 27 A.L.R. 579 (1923). There was no evidence in that case to show that it was the custom of the store to permit persons to leave their coats in this closet or that this service was a convenience offered to its customers so as to bring the closet within the scope of the invitation extended to the public.

Where plaintiff who was a regular customer of defendant's store, entered for the sole purpose of using a telephone and was told by a clerk "Help yourself, Mrs. Ward," the court held that she was an invitee when she slipped and fell on a negligently waxed floor. Just before the injury the manager of the store had made a fruitless effort to sell her a pair of shoes. In that case the court said that even if she were regarded as merely a licensee there was a duty to warn her of the danger from the slippery floor, the condition of which the defendant must be presumed to have known. *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931).

Where plaintiff came upon the premises to look for a dress, she was held to be an invitee. *Osborne v. Klaber Bros.*, (Iowa 1939) 287 N.W. 252. The Tennessee court held the plaintiff to be an invitee where he entered the defendant's store to sell vegetables. *East Tennessee Power & Light Co. v. Gose* (Tenn. 1939) 130 S.W. (2d) 984.
A person may be an invitee on premises in the absence of an express invitation. An implied invitation is one which is held to be extended by reason of the owner doing something or permitting something to be done which fairly indicates to the person entering that his entry and use of the property is consistent with the intents and purposes of the owner. *Freeman v. Levy*, (Ga. 1939) 5 S.E. (2d) 61. Where a person enters premises as an invitee, the law is broad enough to give him protection while lawfully upon that part of the premises reasonably embraced within the object of his visit. *Brett v. Century Petroleum, Inc.*, 302 Ill. App. 99, 23 N.E. (2d) 359 (1939). If by the nature of the place and the use made of it by the public the person feels free to enter it by the implied invitation of the owner, he is an invitee. *Elkto Auto Sales Corporation v. Maryland, to the Use of Ferry* (C.C.A. 4th, 1931) 53 F. (2d) 8.

The invitation of a proprietor of a public place of business extends to portions where the invitee would naturally be likely to go under the conditions of the invitation, and such implied invitation may be manifested by the arrangement of the premises or the conduct of the proprietor. A person who goes on premises for business purposes is not deprived of the right to protection against defects by the fact that at the moment of the injury he was not engaged in the business for which he came but was pursuing a purpose of his own. *American National Bank v. Wolfe*, 22 Tenn. App. 642, 125 S.W. (2d) 193 (1938).

The duty to keep the premises safe for invitees extends to all portions of the premises which are included within the invitation and which it is necessary or convenient for the invitee to visit or use in the course of the business for which the invitation was extended and at which his presence should reasonably be anticipated or to which he is allowed to go. *Freeman v. Levy*, supra. If the invitee does not go beyond that part of the premises to which, as the situation reasonably appears to him, the invitation extends, he cannot be held to have become a licensee because, as a matter of fact, the purposes of the invitation could have been fulfilled without going on such part of the premises. *Freeman v. Levy*, supra.

The plaintiff thus seems to have been an invitee when she entered the prescription room. As an invitee she was entitled to be warned of any hazardous condition of which the defendant knew or reasonably should have known. *Gulf Production Co. v. Quiesenberry*, 128 Tex. 347, 97 S.W. (2d) 166 (1936); *Hubenschmidt v. S. S. Kresge Co.*, (Mo. 1938), 115 S.W. (2d) 211.

The dissenting justices believed that it was at least a jury question as to whether the use of the telephone was one of the accommodations offered by the store in furtherance of its business, and that if it was, the plaintiff did not lose her status as an invitee since she did not enter the prescription room to any greater extent than she had been invited to do. This position seems sound both in reason and on authority.

Plaintiff's counsel had argued that even though the plaintiff was only a licensee, the defendant had failed in his duty to warn her of a dangerous condition of which he knew. This contention the majority of the court answered by saying that there was no evidence that the defendant knew the trap door was open, thus holding in effect that a possessor of land owes a duty to licensees to warn them only of dangers the actual as distinguished from the merely potential existence of which he knows. Certainly the defendant knew there was a trap door, and that it might be open. And it would seem that the court might have held, as did the Connecticut court in *Ward v. Avery*, supra, that the de-
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fendant was presumed to have known of the dangerous condition, since the trap
door was located where it normally would not be opened except by the defendant
or his agents of whose acts he was charged with notice.

GEORGE J. MANGAN.

Torts—Right of Privacy—Unauthorized Radio Dramatization of Shooting.—
Plaintiff, a chauffeur, was held up and shot. He received a severe nervous
shock as a result, and mere mention of the shooting caused him acute nervous
attacks. Defendant dramatized the incident over the radio. On hearing the broad-
cast plaintiff suffered mental anguish which was aggravated by friends who
wished to discuss the occurrence with him. As a result, plaintiff's mental and
physical condition were such that he was unable to drive an automobile with
safety, and therefore was discharged by his employer.

Held, recovery allowed. Following the ruling of the California state court,
the Federal Court held that there was a violation of the plaintiff's right of

The principal case based its decision on the holding in Melvin v. Reid, 112
Calif. App. 285, 297 Pac. 91 (1932). In Melvin v. Reid, plaintiff was a woman
whose private life was made the subject of a moving picture. The court recog-
nized a right of privacy in the clause of the State Constitution which guaran-
teed a right to "obtain and pursue happiness." A Georgia court declared the
right of privacy a natural right protected by the due process clause in its State
ever, such constitutional grounds as a basis for the right of privacy are unsound
and have been severely criticized, (1931) 20 CALIF. L. REV. 100; (1931) 20 KY.
L. J. 184.

The right of privacy was unknown to the common law four decades ago,
and most jurisdictions now refuse to recognize the right, basing their decisions
on the lack of precedent. Roberson v. Rochester Folding Box Co., 171 N.Y. 538,
64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902); Henry v. Cherry, 30
R.I. 13, 73 Atl. 97 (1909).

Many courts have given a quasi-recognition to the right of privacy, but have
sought more settled principles on which to base their decisions. One court men-
tioned the right of privacy where there was an unauthorized use of plaintiff's
name, but based its decision on the property right in the name. Edison v. Edison
was used without consent, recovery was based on the breach of an implied con-
tract that the pictures were not to be used. Bennett v. Gusdorf, 101 Mont. 39,
53 P. (2d) 91 (1936). Similarly where an insane asylum caused noise and anno-
yance to those living near by, the court said there was an invasion of plaintiff's
privacy, but based its decision on the nuisance theory. Pritchett v. Bd. of Comm.,
42 Ind. App. 3, 85 N.E. 32 (1908). Recovery was based on a breach of trust where the defendant took pictures of a malformed set of twins and
then copyrighted the pictures against his assurance that such would not be
personal right" was the basis where pictures were put in the rogue's gallery of
persons who were not convicted. Schulman v. Whitaker, 117 La. 704, 42 So. 227
(1906); Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906).

After the courts denied the right of privacy in Roberson v. Rochester Fold-
ing Box Co., supra, the New York legislature established the right by statute.