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BUSINESS VISITORS AND INVITEES

By WILLIAM L. PROSSER*

THE Restatement of the Law of Torts of the American Law Institute, under the general heading of "Liability for Condition and Use of Land," offers the following definitions:

"Sec. 330. Licensee Defined. A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission.

"Sec. 331. Gratuitous Licensee Defined. A gratuitous licensee is any licensee other than a business visitor as defined in Sec. 332.

"Sec. 332. Business Visitor Defined. A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."

The import of these definitions is made clear by reference to later sections of the Restatement, which declare that toward a gratuitous licensee there is no duty on the part of the man in possession other than to exercise reasonable care in the conduct of his activities, and to disclose dangerous conditions on the land so far as they are known to him; but that toward a business visitor he is under the additional obligation of affirmative care in inspecting and preparing the premises so that they will be in safe condition for his reception. The difference is one of "business dealings," and a business visitor is one whose visit "is or

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²Sec. 342, comment c: "A possessor of land owes to a gratuitous licensee no duty to prepare a safe place for the licensee's reception, or to inspect the land to discover possible or even probable dangers. If the license is gratuitous, the privilege to enter is a gift, and the licensee, as the recipient thereof, is entitled to expect nothing more than a disclosure of the conditions which he will meet if he acts upon the license and enters, in so far as those conditions are known to the giver of the privilege."

³Sec. 343.
may be financially beneficial to the possessor," while "he has no financial interest in the entry of a gratuitous licensee."³

It will be observed that the Restatement of Torts has discarded the term "invitee," which is in common use by the courts, and that whether the visitor enters by invitation or by bare permission, the test is one of pecuniary interest in his presence. The Explanatory Notes of the Reporter⁴ make it clear that "invitation" was jettisoned deliberately. The theory adopted is that which has been advocated elsewhere in the reporter's own writings,⁵ that the duty of affirmative care to make the premises safe is the price which the man in possession must pay for the economic benefit, present or prospective, to be derived from the visitor's presence, and that when no such benefit is to be found, he is under no such duty. This theory apparently has been accepted by several of the learned authors of treatises on torts.⁶ It is the purpose of this article to inquire whether it is, or ever has been, the law of England or of the United States.

It is interesting to compare with the Restatement a recent decision of the supreme court of Kansas.⁷ The defendant operated a corner lunch room and cigar store in the business section of the city of Wichita, at which the plaintiff had been an habitual customer for a number of years. On the occasion in question he entered the premises with no intention of making any purchase, loitered in the front part of the building for fifteen or twenty minutes, and then went to make use of a toilet in the back hallway, where he was injured by falling through an open trap door in the floor. The toilet was used customarily, with the consent of the defendant, not only by customers but also by the public in general; it was understood to be open to the public, and the plaintiff had made use of it "about every day he had been in town." The court held—and surely quite properly—that the plaintiff was

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³Sec. 343, Comment a.
⁶Salmond, Law of Torts (8th ed. 1934) 510; Winfield, Law of Tort (1937) 590; Harper, Law of Torts (1933) 255; Charlesworth, Law of Negligence (1938) 163. In contrast is the careful review of the cases in 1 Beven, Negligence (4th ed. 1928) 570-579, which seems to prefer the theory of invitation.
an "invitee" toward whom the defendant owed a duty of reasonable care to see that the hallway was safe.

There was, of course, no profit to be made out of the plaintiff on this particular visit, for he bought nothing and intended to buy nothing. Made uneasy by talk of economic benefit, the court labored hard to find something of the sort, suggesting advertising and goodwill, and the possibility that he might have become interested in some new brand of cigar on display and purchased it then or on some future occasion. But this, of course, might be equally likely in the case of any friend of the plaintiff entering to wait for him, any loafer coming in to get out of the rain, or even a policeman seeking to arrest the proprietor; in fact, it is not easy to conceive of any visitor to whom it might not apply. If that is what is meant by "business dealings" and "financial interest," then all who enter any retail shop are to be classed as "business visitors."

The case illustrates the uncertainties which surround the test of pecuniary advantage. Instead of a cigar store, suppose that the toilet had been located in a railway station: would the court have considered seriously the chance that the visitor might be attracted by the sight of a train and induced to take a ride? No doubt it may be assumed that there is potential profit to be found in the case of a customer entering a store with an unfulfilled intention to buy, or one who forms that intention after entering, or one who is "shopping" in the hope of finding something that she wants, or even one with the "vague purpose of buying something if she saw anything she took a fancy to." 8

8Of course, if it appears a person had no intention of presently or in the future becoming a customer he could not be held to be an invitee as there would be no basis for any thought of mutual benefit. 45 C. J. 812, sec. 221 and cases cited." 111 P. (2d) 76.


But what of the child too young to buy at all, brought along in its mother's arms, or the man who merely wants change for a quarter, or desires to use the telephone? What of the million tourists who annually have visited Mr. Henry Ford's plant at River Rouge, most of them without any idea of ever buying a Ford? Suppose that a department store gives a free Christmas party, and invites the children of the town? Are not all of these invited, present by reason of a public invitation, and entitled to protection—and yet does the remote and optimistic hope of "business" play any real part in distinguishing them from the barest of licensees? And if so, what are we to do with the visitor at a free public lecture, or the public library, the public comfort station, and the municipal playground?

Evidently something is buried deeper here, and the "business visitor," if we are to call him that, requires something in the way of definition other than what the Restatement has offered. It is well to begin with the early cases, to determine what part the ideas of "invitation" and "business interest" have played in the decisions, and how far they have diverged from one another.

**History**

Although there is some early authority distinguishing between a paying "guest" at an inn and a gratuitous lodger, as in a private home, the modern law may be said to begin with *Parnaby v. Lancaster Canal Co.* in 1839. The defendants operated a canal, from which they failed to remove a sunken obstruction, with resulting damage to the boat of the plaintiff, who paid for the privilege of passing through. The opinion of Chief Justice Tindal (with italics supplied by this writer) states the reason for liability as follows:

"... the facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors ... to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect

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13 Rolle Abr. 3; Cayle's Case, (1584) 4 Co. 32a; Gelley v. Clark, (1607) Cro. Jac. 188; Yorke v. Grenaugh, (1703) 2 Ld. Raym. 868.
14(1839) 11 Ad. & El. 223.
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on leaving a trap door open without any protection, by which his customers suffer injury."

Here is mention of economic benefit in the form of tolls, upon which Professor Bohlen has seized; but is the mention more than casual and incidental? Is not the basis of the decision rather that the canal was thrown open to the public, and that by a very obvious analogy to a common carrier, the defendant had assumed a duty toward any member of the public who might use it pursuant to the invitation given?

Seventeen years later came Southcote v. Stanley, where the plaintiff came to an inn on a private visit to the innkeeper, apparently of a purely social character, and was injured by a piece of glass falling out of a door. He was denied recovery on the ground that he must take the premises as he found them and assume the risk of conditions unknown to the occupier. It is here that the word "business" first made its appearance, in a casual and rather confused remark of Baron Alderson in the course of argument of counsel:

"The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation." 7

Virtually the same words were repeated two years later by Erle, J., in Chapman v. Rothwell, where a customer was injured in a brewery:

"The distinction is between the case of a visitor (as the plaintiff was in Southcote v. Stanley), who must take care of himself, and a customer who, as one of the public, is invited for the purposes of business carried on by the defendant."

Now what does this mean? The inn, like the shop or the brewery, was of course open to the public; but the plaintiff did not come for the purpose for which it was thus thrown open. No doubt he was "invited," but his invitation was a private and not a public one, and he did not share in the duty which the inn-

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15Bohlen, The Basis of Affirmative Obligations in the Law of Tort, (1905) 44 Am. L. Reg. (N.S.) 209, 227. It is of interest to compare with the quotation given above the author's statement of the decision: "... it was held that since the company had made the canal for their profit, and opened it upon payment of tolls to the company, the common law imposed on them a duty to take reasonable care so long as they keep it open for the use of all who choose to navigate it, that 'they may navigate it without danger of their lives and property ... upon a similar principle to that which makes a shopowner liable for neglect in leaving a trap door open by which his customer suffers injury.' ..."

16(1856) 1 H. & N. 247, 24 L. J. Ex. 339.

17Italics supplied.

18(1858) 1 E. B. & E. 168. Italics again supplied.
keeper, as such, assumed toward the public. Read in the light of its context, does "business" refer to anything more or less than the purpose for which the public, as distinct from any private visitor, had been invited to come? This interpretation is borne out by a case arising ten years later, in which the plaintiff came to an inn merely to meet a friend by appointment—a purpose for which the inn undoubtedly was open to anyone—and was permitted to recover as a "guest." Since Southcote v. Stanley it has gone undisputed that a private social visitor, although he may have been invited and even urged to come, is merely a licensee, entitled to no affirmative care to prepare the premises for his reception. There is no line of cases which has done so much to discredit the idea of "invitation" as a basis of liability.

Next in order is Corby v. Hill. The plaintiff was upon a road leading from the highway to a public lunatic asylum for the purpose of a visit, the nature of which is not stated, to the asylum superintendent. He was injured by driving in the dark into a pile of slates left on the road without a light. The opinion of Chief Justice Cockburn gives the first hint of the underlying theory of liability:

"The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. . . . Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held out as a way along which they might safely go."

Here is no word of benefit or hope of advantage, nor indeed


21(1858) 4 C. B. (N.S.) 556, 27 L. J. C. P. 318. For the sake of brevity, the alternative basis of liability suggested by the other opinions, that the defendant had "set a trap" for the plaintiff, is omitted from consideration. The actual defendant in the case, of course, was the contractor who left the slates on the road.
does any appear in the case. It is the "holding out" of a road to a public building as suitable for public use, the implied representation that it is safe, and the entry of the plaintiff in reliance on that representation, which makes the occupier responsible.

*Indermaur v. Daines* in 1866, which usually is regarded as the leading case, is in fact sixth in the series. It is unique among the early cases in that it is the only one in which the plaintiff did not go upon premises open to the public. He was a journeyman gas-fitter, who was making repairs in the interior of the defendant's sugar-refining factory. It was in this connection only that Willes, J., made use of the much quoted words:

"... the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission."

He did go on to consider the case of a customer in a shop, and what he said is perhaps significant:

"This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there on business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was."

It is no doubt easy to dismiss this dictum as referring only to an "accessory" visit, as where the customer returns to pay his bill, or to look for a pocketbook left behind; but is it at all clear that "benefit" to the shopkeeper is the important thing? Had "business," in 1866, acquired the exclusively commercial meaning we now give it, or did it still mean to this court only one's own affairs or concerns, as when we now say, the thing is my own business and none of yours? Or, in other words, merely any purpose for which the shop is open and the public invited in?

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22(1866) L. R. 1 C. P. 274, 35 L. J. C. P. 184, aff'd (1867) L. R. 2 C. P. 311, 36 L. J. C. P. 181. See Griffith, Duty of Invitors, (1916) 32 L. Q. Rev. 255.

23Italics supplied.


There is little point in pursuing the English cases further in detail. Typical of the line of development is Smith v. London & St. Katherine Docks Co., where the plaintiff, having business with the officer of a ship moored at the defendant’s public dock, was injured while returning to shore over a defective gangway. Chief Justice Bovill stated the reason for liability as follows:

"... the gangway being provided by the defendants and paid for by the shipowner, and being for the use of persons having business on board any such ship, it seems to me to amount to an invitation by the defendants to such persons to use it... being there on business he met with an accident by reason of his using what the defendants invited him to use... It seems to me also that the gangway was held out to the plaintiff as the access to the ship for all persons having business with the ship..."

The reader, if he cares to do so, may follow the decisions through for himself. There is certainly occasional mention of payment, of "common interest," of benefit or pecuniary advantage from the plaintiff’s presence, sometimes obviously as a makeweight, sometimes as a reason for saying that the premises were thrown open to the public. But in every case in which they were thus open, it will be found that it is the fact that the plaintiff entered as one of the public, in response to a public invitation, upon a place held out to the public as safe, which is the essential reason for the duty imposed. It is only when the entry is upon private premises for a private purpose that “business dealings” become decisive.

When the English and Canadian courts were at last confronted squarely with the issue of a public invitation without any possibility of economic benefit, in the case of a municipal playground, a free public library, and even a railway crossing open

20(1868) L. R. 3 C. P. 326, 37 L. J. C. P. 217.
for public use,\textsuperscript{31} it is not surprising, in the light of \textit{Corby v. Hill},\textsuperscript{32} that the plaintiffs were held to be "invitees."

Turning now to the American cases, we find that the earliest one of consequence is \textit{Sweeny v. Old Colony & Newport Railroad Co.}\textsuperscript{33} in 1865. The defendants had a private crossing over their railroad, which was not a public highway but had the appearance of one, and had been used by the public, with the defendant's consent, for a number of years. The plaintiff was run down while crossing in accordance with a flagman's signal. It was held, citing \textit{Corby v. Hill}, that he was not a mere licensee, but that the defendant had "invited" him to use the crossing:

"The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use. . . . These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such."

Next came \textit{Gillis v. Pennsylvania Railroad Co.},\textsuperscript{34} in 1868. The plaintiff was one of a multitude of spectators who assembled on the defendant's station platform on an occasion when President Andrew Johnson passed through on a special train. The defendant apparently had endeavored to keep the president's arrival secret, in order to prevent detention and confusion. The plaintiff was injured when the platform gave way. It was held that he was at most a licensee, since the station was not thrown open to the public for the purpose for which he came. The court

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\textsuperscript{32}(1858) 4 C. B. (N.S.) 556, 27 L. J. C. P. 318.

\textsuperscript{33}(1865) 10 Allen (Mass.) 368, 87 Am. Dec. 644.

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distinguished the case of one who might be there "to welcome a coming or speed a parting guest,"\(^3\) and said:

"I am bound to have the approach to my house sufficient for all visitors on business or otherwise; but if a crowd gathers upon it to witness a passing parade and it breaks down, though it may be shown not to have been sufficient for its ordinary use, I am not liable to one of the crowd."

_Swords v. Edgar,\(^3\)\(^6\) in 1874, is next to merit attention. The defendants owned the south half of a pier in New York harbor, which they leased to a tenant. The plaintiff's intestate was a long-shoreman unloading cargo from a steamer, who fell through the rotten flooring of the pier. He was held to have been "invited." The pier was likened to an inn; it was "thrown open for entrance upon, by all persons of the calling of the intestate:"

"Though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it and refuse entrance upon it to any and all persons, yet so long as it was kept open to that portion of the public of which the intestate was one, for the profit of the defendant's lessees, there was upon such lessees primarily, the duty of taking care, so long as it was thus kept open, that those who had lawful right to go there, could do so without incurring danger to their persons."

Next in order\(^3\)\(^7\) is _Beck v. Carter,\(^8\) in 1877. The defendant's hotel adjoined an alley which had been used by the public for a number of years, as a highway. Such users habitually passed over a portion of the defendant's lot next to the alley, and the boundary line was not marked out in any way. A pedestrian who fell into an excavation on this part of the lot was held to have been "invited" to come:

"It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place, and part of the highway."

Finally, in 1880, came _Davis v. Central Congregational Society.\(^9\) The defendant religious society held in its meeting-house a church conference, which all members of every Congregational church in the vicinity of Boston were invited formally to attend.

\(^7\)Omitting one or two cases which add nothing.
\(^8\)(1877) 68 N. Y. 283, 23 Am. Rep. 175.
The plaintiff, a member of one such church, came to the conference and was injured by falling on an unsafe path leading to the front door. She was allowed to recover because "she came by the defendant's invitation," and the court said:

"It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff came by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that too although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity."

Again there is no room to pursue the cases further, and the reader may follow them for himself. It is sufficient to say that in none of these earlier decisions does "benefit" to the occupier play any important part, and that in most of them it is entirely absent. The theory of liability is simply that the defendant has opened his premises to the public with an invitation to come, and that the plaintiff has come as one of the public, in reliance upon an implied representation of safety.

What, then, is the origin of the notion that benefit to the occupier is the sine qua non of an affirmative duty of care to make the premises safe? So far as can be discovered, it seems to have originated in the mind of the writer of a forgotten treatise on the law of negligence, Robert Campbell, whose first edition appeared in 1871. Apparently he derived it from the rather ambiguous language used in Southcote v. Stanley and Smith v. London & St. Katherine Docks Co. In 1880 the Supreme Court of the United States quoted Campbell in a case which seems to

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41 Campbell, Law of Negligence (2d ed. 1878) 63-64: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

42 (1856) 1 H. & N. 247, 24 L. J. Ex. 339.

43 (1868) L. R. 3 C. P. 326, 37 L. J. C. P. 217.

have been decided rather on the basis of public invitation. The first decision, however, in which the idea of "business" was controlling, was *Plummer v. Dill*, in 1892. The plaintiff came to the defendant's building in search of her own missing servant—a purpose, by the way, for which it was of course not thrown open to the general public. In holding that she was only a licensee, the Massachusetts court stated the reason thus:

"It is well settled in England that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant."

Even this does not appear very conclusive, in view of the last qualifying phrase, and the limitation of the opinion to "a place fitted up for ordinary use in business." And especially in the light of the court's later reference to "a purpose not connected with the use for which the building was fitted, or to which it is put," its approval of *Davis v. Central Congregational Society* as involving an object "among those contemplated by the defendant when the building was erected," and its acceptance of cases where a private way is made to look like a street as based on an invitation "to come as one of the public and enjoy a public right." In other words, it is far from clear that the occupier's "business" is intended to mean anything more than the purpose for which the building was opened.

With this impetus, however, other courts presently began to insist upon some "business," "interest," "benefit," or "advantage" on the part of the defendant. But parallel with such decisions were others still relying merely upon a public invitation. In 1905,

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49Howe v. Ohmart, (1893) 7 Ind. App. 32, 33 N. E. 466; Phillips v. Library Co. of Burlington, (1893) 55 N. J. L. 307, 27 Atl. 478; St. Louis,
when Professor Bohlen wrote his initial article⁵⁰ setting forth the theory that the duty is the price of the benefit, the cases which might have been cited in support of it were actually in a very small minority.

**Premises Open to the Public**

This long, and it is hoped not too tedious review of past history is of course preliminary to a consideration of the present state of the law, and the proper rule. This much at least should be clear from these early cases: that the duty of the occupier toward his "invitee" was not, in its inception, a matter of a quid pro quo for a benefit conferred or hoped for. It rested rather upon an implied representation of safety, a holding out of the premises as suitable for the purpose for which the visitor came; and this was stated in terms of an invitation to come. "Invitation" is today a much discredited word, if only because a private social guest is invited, and yet is not in the legal sense an "invitee;" but the idea which it conveys, that the place is held out to the visitor as prepared for his reception, is still essentially valid. Now an invitation may be to the general public, or it may be private, to the individual only.⁵¹ The early cases were preoccupied with public invitation, because with one exception they involved premises open to the public. It is well, therefore, to begin with this problem. An examination of the cases reveals that, while there is frequent mention of "business" or "benefit" to the occupier, it appears for the most part as a reason for allowing recovery to customers, who obviously are invited; and the decisions in which recovery is denied because of its absence are astonishingly few.

"Thrown open to the public" requires definition. It is not enough that the public at large, or any considerable number of persons, are allowed to wander at will over the defendant's land for their own pleasure or advantage. That is a license only, which

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⁵¹ As to private invitations, see infra, p. 602. The distinction between public and private invitation is suggested in 1 Thompson, Negligence (1901) secs. 994-996; Durning v. Hyman, (1926) 286 Pa. St. 376, 133 Atl. 568, 53 A. L. R. 851. The same distinction would appear to hold good as to those riding in automobiles. The gratuitous guest in a private car is always held to be no more than a licensee. But a non-paying passenger in a bus or taxicab is still a passenger, when he rides as one of the public.
carries with it no assurance of care taken to make the place safe for the visitor, and tells him in effect that he is expected to look out for himself. The illustration which comes at once to mind is that of pedestrians permitted by long usage to walk along railway tracks.

What is required is something in the way of an appearance of offering to the public and inducement to enter, of preparation, or assurance that the premises are provided and intended for public use—that the public will not merely be tolerated, but is welcome, encouraged and desired to come. It is in this sense that “invitation” is used quite properly. Thus when a strip of private land abutting upon the sidewalk is so paved that it is indistinguishable from the highway, or a private way.


or a railroad crossing or footbridge is given the appearance of a public thoroughfare, the owner is regarded as holding it out to the public as provided for use by the public as the public, for the purpose of passage. When a landowner tacitly permits the boys of the neighborhood to play baseball on his vacant lot, they are licensees only, but if he installs playground equipment and throws it open to the children of the town as offered and provided for the purpose, even though quite gratuitously, there is then a public invitation.

When land is thus thrown open to the public, the condition of the premises begins to affect the public interest. The occupier does not, of course, become a public utility or a public servant, like a common carrier; nor is his land dedicated irrevocably to public use, since he may always withdraw his invitation and exclude anyone he likes. But when the public, as such, is led to believe that premises have been provided, offered, held out for public entry, both the earlier and the later cases make it clear that the occupier assumes a duty of reasonable care to see that the place is safe for the purpose, which extends to those who are injured when they enter in response to the invitation. This duty is not far removed from the obligation to the public upon the highway itself, or to those who stray a few feet from it in the course of travel.


tion, benefit, or advantage to the occupier should play any greater part in the one case than in the other.

Few premises, however, are ever thrown open for all things to all men. The occupier is free to choose the purpose for which his land is provided, offered, and to be used, and to invite only those members of the public who come for that purpose. A railway station, which is certainly the most public of places, invites all passengers, even those who are to ride free, and it invites those who come to inquire about transportation. It invites also the friends of passengers who come to meet them on arrival or to see them off, and while some courts have struggled hard to find economic benefit to the carrier in the possibility that the friend may render some assistance, or have said that the passenger pays for the privilege of bringing his friends, it seems clear that they are held to be "invited" merely for the sufficient

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reason that they come for a railway purpose. The station likewise invites one who comes to mail a letter on a train, or to read a notice required by law to be posted there. But it is not provided for spectators, sightseers and curious children, or for the man who loiters beyond a reasonable time after missing his train, or who comes to solicit business for his boarding house or to buy goods from a third person, or enters to pay a social visit to a telegraph operator, or merely to get out of the rain. Such visitors are licensees at most; they are not "invited" by premises offered to them for the purpose. The business carried on by the occupier, and his hope of benefit, are of course significant as an index of the type of visitors who are encouraged to come; but no less important are the character of the building, the use to which it is devoted, the customs of the community and the conduct of the parties in the past; and "benefit" is by no means the controlling factor.

Customers in shops and other establishments open for

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68St. Louis, I. M. & S. R. Co. v. Fairbairn, (1886) 48 Ark. 491, 4 S. W. 50.


75The protection afforded of course extends to both entrance and exit. Stark v. Great A. & P. Tea Co., (1926) 102 N. J. L. 694, 133 Atl. 72; Greenly v. Miller's, (1930) 111 Conn. 584, 150 Atl. 560; Huber v. American Drug Stores, (1932) 19 La. App. 430, 140 So. 120; F. W.
public patronage have been, for obvious reasons, the most common type of "invitees;" but it does not follow that no one is invited to enter such places who does not bring the potentialities of profit. One who comes into a store in the reasonable hope of buying something not sold on the premises is still invited to come.\textsuperscript{77}

The ordinary American or Canadian gasoline filling station, which offers virtually everything in the way of free service except shining the visitor’s shoes, certainly invites the motorist who stops on the particular occasion only to use the toilet\textsuperscript{8} or to get free air for his tires. Those who enter stores and shops only to make use of a telephone\textsuperscript{9} or a toilet\textsuperscript{0} provided for the public have been held to be invitees; and so has the man who goes into a bank to get change for a five dollar bill,\textsuperscript{81} or to an inn to meet a friend,\textsuperscript{82} or enters upon private land adjoining the sidewalk to

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\textsuperscript{79} Nelson v. Zamboni, (1925) 164 Minn. 314, 204 N. W. 943.


\textsuperscript{81} American Nat'l Bank v. Wolfe, (1938) 22 Tenn. App. 642, 125 S. W. (2d) 193. Contra, Cobb v. First Nat'l Bank of Atlanta, (1938) 58 Ga. App. 160, 193 S. E. 111, where the plaintiff entered the bank to obtain a blank form for a promissory note. But quaere: is this a service for which banks are understood to be open to the public?

look at a display in a window. Spectators entering places of amusement on a pass have been held to be "invited," and so have members of the public who come in response to an advertisement of "Ashes and boxes given away."

Children and friends who accompany customers into shops with no intention of buying anything themselves are held quite generally to be invitees; and although there is some occasional effort to find "benefit" in the possibility that the friend may offer advice or assistance, or that the mother may be unable to come if she must leave her child at home, the reason usually given is merely that this is included within the purpose for which the store is thrown open. Thus a child accompanying one on business

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88Or may be induced to buy himself. Kennedy v. Phillips, (1928) 319 Mo. 573, 5 S. W. (2d) 33. Compare the cases of friends accompanying railway passengers, supra, notes 63-66.

at a private residence\textsuperscript{99} is only a licensee. Passengers in automobiles who go with drivers to garages,\textsuperscript{91} or filling stations\textsuperscript{92} and parking lots,\textsuperscript{93} have been held in the same manner to be invitees. Tourists who visit factories have been held to be "invited" when the initiative comes from the management under circumstances indicating that the premises are thus open to the public,\textsuperscript{94} but not where a group of school children request the privilege in a plant not otherwise open for the purpose\textsuperscript{95}—although any economic advantage in the form of advertising or goodwill would appear to be the same in either case. It is possible to discern much the same distinction in the case of salesmen drumming up trade,\textsuperscript{96} or workmen in search of employment,\textsuperscript{97} who are treated as invitees when


they come to an office which they have good reason to believe to be open for consideration of possible dealings with them, but not when they enter without such encouragement.\textsuperscript{8} A canvasser calling at a private home is certainly nothing more than a licensee.\textsuperscript{9} Again any possibility of pecuniary benefit, which can arise only if the defendant should decide to deal with his visitor, is the same in either case. Prospective tenants\textsuperscript{10} and purchasers\textsuperscript{10} of real estate are likewise "invited" if they come in response to advertisements or other active encouragement, but not if they come on their own initiative to make casual inquiry as to whether there may be a vacant apartment in the future.\textsuperscript{12}

Anyone who enters a business establishment in order to pay a social visit to an employee is obviously a licensee at most,\textsuperscript{13}


\textsuperscript{13}Mills v. Heidingsfield, (La App. 1939) 192 So. 786; Mortgage Comm'n Servicing Corp. v. Brock, (Ga. App. 1939) 4 S. E. (2d) 669.

since no one can reasonably suppose that the place is open for such a purpose. The same is true, in general, of one who seeks to sell the workman insurance,\textsuperscript{104} or to have other personal business dealings with him.\textsuperscript{105} There are a number of cases, however, in which those who bring meals\textsuperscript{106} or water\textsuperscript{107} to employees have been held to be "invited" on the ground that the employer had so far permitted and encouraged the practice that it might reasonably be believed that the premises were open to any member of the public coming for such a purpose. The effort sometimes made to find "benefit" to the employer in the form of keeping his workmen happy appears rather disingenuous; at least it fails to distinguish the cases.

Finally, there are a substantial number of decisions in which "invitation" has been found although no possible financial advantage to the occupier is apparent, and the premises have been thrown open with no pecuniary end whatever in view. There are first of all the cases, mentioned above,\textsuperscript{108} of private ways or strips adjoining the highway, paved or otherwise arranged to give the appearance of public invitation. The attempt to distinguish these on the basis of some especial deceptiveness, or an appearance that they are part of the public highway itself seems scarcely sound, if the real basis of liability is an encouragement to the

\textsuperscript{104}Indian Refining Co. v. Mobley, (1909) 134 Ky. 822, 121 S. W. 657; Roadman v. C. E. Johnson Motor Sales, (Minn. 1941) 297 N. W. 166.
\textsuperscript{108}See supra, notes 54-57, and text. Compare the cases of ways of entry cited infra, note 169.
public, as such, to enter—and particularly so since in most of the cases the visitor has clearly not been misled as to the character of the private way. It has been held also that private premises thrown open for free public meetings or lectures, or for gratuitous use as a public playground or recreation center, must be inspected and kept in safe condition for the reception of those who enter them without pay. In addition, there are municipal premises. The immunity conferred on municipal corporations is in process of being broken down by degrees, particularly with regard to land and buildings open to the public; but there has been little discussion of the status of the visitor in such a case. Without exception, once the immunity is removed at all, members of the public who enter municipal parks and playgrounds, swimming pools, libraries, comfort stations, wharves, golf courses, community centers, or a state canal lock open to

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209 Davis v. Central Congregational Society, (1880) 129 Mass. 367, 37 Am. Rep. 368 (church conference); Howe v. Ohmart, (1893) 7 Ind. App. 32, 33 N. E. 466 (college literary society); Bunnell v. Waterbury Hospital, (1925) 103 Conn. 520, 131 Atl. 501 (lecture). Cf. Richmond & Manchester R. Co. v. Moore's Adm'r, (1897) 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258 (balloon ascension at amusement park); Recreation Centre Corp. v. Zimmerman, (1937) 172 Md. 309, 191 Atl. 233 (free spectators at bowling contest); Napier v. First Congregational Church, (1928) 174 Minn. 389, 219 N. W. 463 (social meeting in church); Guilford v. Yale University, (Conn. 1942) 23 A. (2d) 917 (college class reunion under the hallowed elms); Weigel v. Reintjes, (Mo. App. 1941) 154 S. W. (2d) 412 (church service).


212Parks: Ellis v. Fulham Borough Council, [1938] 1 K. B. 212, 107 L. J. K. B. 84; City of Canon City v. Cox, (1913) 55 Colo. 264, 133 Pac. 1040; City of Anadarko v. Swain, (1914) 42 Okla. 741, 142 Pac. 1104; Earden v. City of Grafton, (1925) 99 W. Va. 249, 128 S. E. 375; City of Sapulpa v. Young, (1931) 147 Okla. 179, 296 Pac. 418.


213City of Longmont v. Swearingen, (1927) 81 Colo. 246, 254 Pac. 1000; City of Columbia v. Wilkes, (Miss. 1936) 166 So. 925; Ashworth v. City of Clarksburg, (1937) 118 W. Va. 476, 190 S. E. 763.


216Hise v. City of North Bend, (1931) 138 Or. 150, 6 P. (2d) 30.


visitors, although they pay nothing, have been held to be "invited," and entitled to affirmative care to make the place safe. There has been no attempt to find any pecuniary benefit to the defendant in such cases, and indeed it is difficult to see how it can possibly be found. The basis of liability, when it is stated, is merely that of public invitation.

When we turn to those persons entering business premises open to the public who are held merely to be licensees, it is the absence of "invitation" which at once becomes apparent. The list includes loafers, loiterers, and those who come in only to get out of the weather; a drunken man in a saloon forbidden by law to sell him liquor; those in search of their servants, children, and other third persons; spectators and sightseers who are not in any way encouraged to come; salesmen and workmen looking for employment at a place not apparently open for the purpose; one who drives through a cemetery for pleasure; persons taking short cuts through passages not open to the public as a thoroughfare; those who come for social visits or personal business dealings with employees, not encouraged by the em-

123 See supra, note 69. Otherwise if the premises are thrown open to spectators; see supra, note 84.
124 See supra, note 98.
ploys; one who seeks to borrow a tool, or to pick up refuse for his own purposes; a stranger entering an office building to post a letter in a mail-box provided for the use of tenants only.

It is not the lack of "business interest" which deprives these people of protection, since the possible advantages of advertising and goodwill, and the chance that the visitor may be induced to change his mind and make a purchase, would seem to be at least as great as in many cases where "invitation" has been found. It is rather the fact that the premises obviously are not provided for such a purpose; that the visitor is not solicited or encouraged to come for such an end; in short, that he must understand that his presence will be suffered at most, and that he is not invited to come.

There are two groups of cases which appear to have particular significance in connection with this matter of business interest. One of these involves customers who enter to shop or to buy, and subsequently make use of toilets, rest rooms and other accommodations on the premises. The cases divide very clearly. If the toilet is provided and maintained for the use of customers, and so is thrown open to them with other parts of the premises, as is usual in department stores, railway stations and theatres, the customer is held to be an invitee when he uses it. If, on the other hand, it is kept for the private use of the occupier and his employees, is not provided for customers, and the permission to use it is granted only as a favor to the individual, as is often the case in the corner drug store or the butcher shop, then he is

127 See supra, notes 103-106. This holds true even though the premises are otherwise open free to the public. Hall v. State, (1940) 173 Misc. Rep. 903, 19 N. Y. S. (2d) 20.
no more than a licensee. The Restatement of the Law of Torts has dealt with these cases in terms of an "area of business invitation." But so far as there is any question of benefit to the defendant, which surely can be only in the form of goodwill or a satisfied customer, is there any distinction to be found between the two situations? Is not one merely a matter of public invitation, the other of private license?

The second group of cases involves landlords who lease premises for the admission of the public. The lessor of course derives economic benefit, his rent, when he leases a private dwelling for the private use of a private tenant. He receives precisely the same benefit, and no other, when he leases a building for use as a theatre or an hotel. Yet in the first case he is not under any obligation to inspect and repair the premises before he turns them over, while in the second he is. The difference, of course, is that in the second case the lease is for the purpose of inviting the public to enter. The landlord's responsibility to the public is so great that it cannot be shifted even to a tenant who covenants to make repairs, although it has been held that he

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134 Sec. 343, Comment b.


will be protected by an agreement that the public are not to be admitted until the repairs have been made.\textsuperscript{137}

The earlier cases in which the question arose involved such places as wharves and piers,\textsuperscript{138} theatres and other halls of entertainment,\textsuperscript{139} grandstands,\textsuperscript{140} amusement parks,\textsuperscript{141} beaches,\textsuperscript{142} and hotels.\textsuperscript{143} This has led the Restatement of the Law of Torts\textsuperscript{144} to limit the principle to leases "for purposes involving the admission of numerous persons," apparently requiring the entrance of a large number of people at a time. No good reason for this limitation ever has been suggested; and the courts have extended the landlord's liability to premises leased for use as small shops,\textsuperscript{145} a doctor's office,\textsuperscript{146} a garage,\textsuperscript{147} a small public meeting,\textsuperscript{148} and a doctor's office,\textsuperscript{146} a garage,\textsuperscript{147} a small public meeting,\textsuperscript{148} and a


\textsuperscript{144}Sec. 359.

\textsuperscript{145}Gilligan v. Blakesley, (1933) 92 Colo. 370, 26 P. (2d) 808.

\textsuperscript{146}Warner v. Lucey, (1923) 207 App. Div. 241, 201 N. Y. S. 658,
boarding house. In fact, it appears that any premises intended to be used for the purpose of inviting the general public to enter will come under the duty, although it obviously does not arise in the case of a warehouse leased for private storage, or a private pier. In only two cases has the question of the landlord's rent played any part; and since the duty does not arise toward the tenant who pays the rent, but toward the visitor who does not, it would seem that the Oklahoma court is correct in holding that the lessor may be liable even when he donates the premises for the admission of the public. As Judge Cardozo has said, it is simply the public use to which the land is put which is the source of the duty.

The landlord's responsibility extends only to those parts of the premises which are to be thrown open to the public, and he is not liable for any public use not contemplated by the lease. Neither is he liable, regardless of his rent, to anyone who does not come for the purpose for which the premises are to be open to the public; and a loafer in a saloon has no better

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Stenberg v. Willcox, (1896) 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615 (the language of the court extends a great deal beyond the facts); Lucas v. Brown, (C.C.A. 8th Cir. 1936) 82 F. (2d) 361.


Laireso v. Bush Terminal Co., (1933) 261 N. Y. 323, 185 N. E. 398

In Davis v. Schmitt Bros., (1922) 199 App. Div. 683, 192 N. Y. S. 15, and Karlowski v. Kissock, (1931) 275 Mass. 180, 175 N. E. 500, where the premises were donated for charity, it was held that there was no duty upon the donor because he received no benefit. The customers were said to stand in no better position than the donee.


"We may say more simply, and perhaps more wisely, rejecting the fiction of invitation, that the nature of the use itself creates the duty, and that an owner is just as much bound to repair a structure that endangers travelers on a walk in an amusement park as he is to repair a structure that endangers travelers on a highway." Cardozo, J., in Junkermann v. Tilyou Realty Co., (1915) 213 N. Y. 404, 408-409, 108 N. E. 190, L. R. A. 1915F 700.


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In this connection, it is interesting to find the New Jersey court\textsuperscript{158} holding that the lessor was not liable when a dwelling house was leased to a doctor to be used as his office, on the ground that it must be obvious to any visitor that the building was not designed for the purpose, and so it was not held out to the public as fit for it.

A comparison may be made here with the rule which holds a landlord responsible, when he leases different parts of an office building or an apartment house to separate tenants, for the safe condition of approaches, stairs and other "common passageways" used by all the tenants. It is the prevailing American rule, although there is authority to the contrary,\textsuperscript{159} that this duty extends even to social guests of the tenants,\textsuperscript{160} to whom the lessee himself would not be responsible on the premises leased. The reason usually given is that the lessor has retained "control" over the passageway; but this does not explain why he should owe a duty to visitors who confer no financial benefit upon anyone. Nor is it a matter of the tenant's rent, since there is no such duty to the guest when he is inside of the apartment. The explanation may be suggested, that the lessor has held out such parts of the premises as open and provided for the use of anyone coming for all usual and customary visits to his tenants, and that to that extent he has made them a public place.

\textsuperscript{157}Kreiser v. Belasco-Blackwood Co., (1913) 22 Cal. App. 205, 133 Pac. 989. Accord, Restatement of the Law of Torts, sec. 359, Comment b (delivering provisions, etc.)

\textsuperscript{158}La Freda v. Woodward, (1940) 125 N. J. L. 489, 15 A. (2d) 798, 130 A. L. R. 1299.


\textsuperscript{162}Jones v. Asa G. Candler, Inc. (1918) 22 Ga. App. 717, 97 S. E. 112.

tion that the premises are provided for that purpose; and even as to the landlord they remain licensees.

In short, the conclusion is that whenever premises are thrown open and held out to the public as provided for public admission, there is an implied representation that care has been taken to prepare them and make them safe for the purpose for which they are open; and a duty to take such care is assumed toward anyone who comes for that purpose, regardless of whether he brings with him any potentiality of profit, benefit, advantage or gain. The duty is a public one, and it does not differ essentially from the obligation not to endanger the safety of members of the public on the highway. It is entirely possible to regard it as a mere extension of that obligation to the public invited to enter from the street.

Private Invitation

Cases of private invitation have been rather less frequent, although two of the earliest of them have received perhaps undue attention. A private "invitation" or permission to enter is one which is extended to the individual only, and is not shared by the public at large. It follows that the individual cannot rest his claim upon any representation made or any duty owed to him as one of the public, but must look to his personal relation with the occupier as the source of the obligation to protect him. The purpose for which he comes is again highly important; but the circumstances under which he enters, and the understanding to be implied from them, are more important still, and there is a great deal of variation according to the individual case.

There may be a private invitation to enter for a private purpose upon premises open for other purposes to the public—as in the case of a social visit to an innkeeper, or a contractor and his workmen hired to make repairs in a railway station, a hotel, or a department store. On the other hand, premises otherwise

164 That this is the basis of liability is indicated by the holding that where premises are open to the public, but do not appear to be so, and the visitor does not know it, no duty arises. Stevens v. Nichols, (1892) 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459. Cf. La Freda v. Woodward, (1940) 125 N. J. L. 489, 15 A. (2d) 798, 130 A. L. R. 1299. Or when the defendant is not responsible for appearances. Conroy v. Allison Storage Warehouse Co., (Mass. 1935) 197 N. E. 454.

165 Southcote v. Stanley, (1856) 1 H. & N. 247, 24 L. J. Ex. 339; Indermaur v. Dames, (1866) L. R. 1 C. P. 274, 35 L. J. C. P. 184, aff'd (1867) L. R. 2 C. P. 311, 36 L. J. C. P. 181.

entirely private may be thrown open to the public for a particular purpose, as in the case of an advertisement for purchasers or tenants, or a reward offered to anyone who can find a well on a farm. There are even a few cases, with none to the contrary, indicating that anyone who provides a walk leading from the street to his house, with front steps and a doorbell, thereby opens them to the public to the extent that he becomes responsible for their safe condition to any passer-by who enters to use them for any legitimate purpose for which they appear to be designed, such as to ask his way. For private invitation we must look, then, to premises or parts of premises not open to the public, or to those who enter for purposes for which the public is not invited.

The earliest case of private invitation was that of a social guest; and ever since social guests have been held to be mere licensees. Now a social guest is invited; he usually is besought and urged to come. So far as benefit to the occupier is concerned, it would not be particularly difficult to find it in the pleasure which his visit confers; and if this has no pecuniary value, neither has the benefit to a municipality from the use of a public park. If the guest should bring a Christmas present, or if in the course of his visit he were to lose money to his host at poker or bridge, or to offer to buy an antique vase, it may be doubted very seriously

167 See supra, notes 100, 101.
that his status would suddenly be changed. The attempt of the supreme court of Montana\(^{172}\) to find economic advantage in the fact that the guest has opened the garage door for his host appears distinctly naïve. Why, then, is such a guest not in legal terms an "invitee?" The reason the courts have given is the simple one, that the guest understands when he comes that he is to be placed on the same footing as one of the family, and must take the premises as the occupier himself uses them, without any preparations made for his safety; that he assumes the risk of defective conditions unknown to the occupier, and is entitled at most to a warning of dangers that are known. Whether or not this is in accord with present social customs and the general ideas of hosts and guests on the subject,\(^{172}\) it at least indicates that it is the terms on which the invitation is given which are important, rather than the invitation itself.

The same explanation holds good in the case of a long list of persons who are permitted to make use of private premises gratuitously for their own purposes, whether it be by formal invitation or by bare permission of the occupier. Private visitors on a tour through a factory not open to the public,\(^{174}\) those on social or personal business visits to employees,\(^{175}\) a child who comes with his sister on business at a private home,\(^{176}\) a discharged

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In Colgrave v. Malstrom, (N.J. 1941) 23 A. (2d) 288, the social guest gave incidental advice concerning the purchase of bed coverings. The court rejected the contention that the "benefit" thus conferred made her an invitee, saying: "The defendant's premises constituted her home. They were used as a home and for nothing else. Everything that was done there radiated about the idea of home. The dog, the backyard, the kitchen porch, the bedroom, the comforter, the visit, the inspection—all these things and acts were incidental to the home. We think that the familiar and homely custom of back door calling by neighbor upon neighbor may not be so delicately refined and distinguished; otherwise adroit reasoning could spell a benefit to the inviter out of practically every invitation 'to come and see' and the 'guest' rule would be quickly whittled away."

\(^{174}\) See supra, note 95.

\(^{175}\) McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, (1936) 1 Mo. L. Rev. 45, 58, doubts this: "It is customary for possessors to prepare as carefully, if not more carefully, for social guests as for business guests; furthermore, the social guest has reasons to believe that his host will either make conditions safe or at least warn of hidden dangers. In this century there is no reason for the courts to take the position that a social guest should not sue his host."

servant allowed to sleep in a hotel over night, one who comes to borrow a tool or the use of a prune drier or a grindstone, to use a toilet not open to the public, to mail a letter in the defendant's box, to remove his own property from a building under construction, or to pick up and remove refuse—all have been held to be only licensees. The use of the premises is understood to be received as a gift; a gift horse is not to be looked in the mouth, and the visitor has no reasonable expectation that care has been taken to make the place safe for the purpose.

In direct contrast to such cases is Indermaur v. Dames, where the plaintiff was a gasfitter in the service of an independent contractor, who came to make repairs in the interior of the defendant's factory. He entered in the performance of a contract, which carried an obligation on the part of the defendant, not only to pay but also to furnish the place for the work to be done. There is obvious analogy to the defendant's own servants, and his duty to provide them with a safe place to work. Like the servant, the plaintiff had reason to expect reasonable care, and like the servant he did not assume the risk of conditions of which he had no knowledge. Since this decision independent contractors and their servants doing work on the occupier's

186(1866) L. R. 1 C. P. 274, 35 L. J. C. P. 184, aff'd (1867) L. R. 2 C. P. 311, 36 L. J. C. P. 181.
premises have been held without dissent to be "invitees," whether in business establishments or in private homes. The same reasoning applies in the case of those delivering goods purchased, at places of business or private dwellings; to one who comes to a farm to buy grain, or pays for the privilege of dumping refuse, or for the use of a road by maintaining it, or assists a janitor in return for his room and board; and it applies


equally to one who comes to estimate costs before a contract is actually made.\textsuperscript{196}

It is here that business interest, or benefit, plays its legitimate part. It is not the fact that benefit is conferred which is decisive, but the fact that it is conferred in the expectation of a return, an obligation to provide a safe place to confer it. If the benefit is given without such expectation induced, as in the case of volunteer assistance, it is held very generally that the volunteer is not entitled to protection.\textsuperscript{197} It is only where such assistance is rendered under circumstances which indicate that the plaintiff is accepted on the footing of a gratuitous servant, and so impliedly assured that he will be protected,\textsuperscript{198} or where he has some other reason to expect protection in return,\textsuperscript{199} that he is regarded as more than a licensee.

There are many cases of customers and others who enter parts of premises not open to the public, for the purpose of the


\textsuperscript{198}This is of course a matter of the particular facts. Supornick v. Supornick, (1928) 175 Minn. 579, 222 N. W. 275; Nevada Transfer & Warehouse Co. v. Peterson, (1940) 60 Nev. 87, 99 P. (2d) 633; Button v. Chicago, M. & St. P. R. Co., (1894) 87 Wis. 63, 57 N. W. 1110; Tucker v. Buffalo Cotton Mills, (1907) 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957.

\textsuperscript{199}Gray v. Foundation Co., (1922) 151 La. 7, 91 So. 527 (expert inspecting ship-launching); Henry W. Cross Co. v. Burns, (C.C.A. 8th Cir. 1936) 81 F. (2d) 856 (giving advice on how to run plant); Welch v. Maine Central R. Co., (1894) 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658 (workmen assisting for benefit of their own employer); McIntire Street R. Co. v. Bolton, (1885) 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803 (passenger assisting in order to continue journey); Louisville & N. R. Co. v. Ward, (1897) 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848 (employee of shipper assisting to move cars).
business for which other parts are open. If they go behind the counter, or into a storeroom to look for goods, with the invitation or encouragement of the occupier, they are held to be invitees; but if they go on their own initiative, without such encouragement, they are no better than licensees. The potential benefit, the possibility that the excursion will result in a purchase, would appear to be the same in either case. The difference, which the Restatement again has described as one of “area of business invitation,” is merely one of whether the visitor has been led to expect that the premises have been made safe for his reception.

When we turn to public officers and employees who enter in the performance of their duties, it becomes even more difficult to account for the cases on any theory of benefit. Pecuniary advantage is perhaps not impossible to spell out in the case of sanitary and safety inspectors, a garbage collector, a city...

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202Sec. 343, Comment b.


water meter reader, or a postman although as to the last it becomes rather strained if he is the bearer of bad tidings in the form of a claim for damages, and the ordinary citizen would regard it as equally fanciful in the case of a customs or tax collector. At least such people know that the occupier is required by law to receive them, and so have reason to believe that their coming is anticipated, and that the premises are ready for their reception; and so they are properly held to be invitees. Firemen and policemen on the other hand, are held almost uniformly


to enter under a bare license, and to be entitled at most to disclosure of known dangers. It is surely absurd to say that a fireman who comes to extinguish a blaze in the defendant's building, or a policeman who comes to prevent a burglary, confers no economic advantage; and his invitation is certainly clear enough when he enters in response to a desperate call for help.\textsuperscript{212}

It seems evident that in all of these cases neither benefit nor invitation has played any important part; and it has been pointed out\textsuperscript{213} that the occupier's "invitation," or his conduct in the matter, can make no difference, since the officer enters in the performance of a public duty, and would enter even if the defendant made active objection. Granted that this is true, the question remains as to what he may reasonably expect to find when he comes. Why, then, are visiting firemen and policemen set apart as a class to whom no duty is owed to inspect and prepare the premises? One obvious reason, which has been mentioned in nearly all of the cases, is that these individuals enter at unforeseeable moments, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation cannot reasonably be looked for. A man who climbs in through a basement window in search of a fire or a thief cannot expect an assurance that he will not find a bulldog in the cellar. Regardless of benefit or invitation, there is no reason to suppose that the place has been made safe. It is worthy of note that in every one of the cases in which recovery has been denied to such plaintiffs, some such element of unusual and unexpected entry has been present.

If this is the explanation, then there would seem to be obvious merit in the few decisions\textsuperscript{214} holding that such a public servant

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\textsuperscript{212}A fireman who is employed, or who responds to such a call with no duty to do so, has been held to be an invitee. Clinkscales v. Mundkoski, (Okla. 1938) 79 P. (2d) 562; Buckeye Cotton Oil Co. v. Campagna, (1922) 146 Tenn. 389, 242 S. W. 646. Compare, as to policemen: St. Louis-San Francisco R. Co. v. Williams, (Okla. 1936) 56 P. (2d) 815; San Angelo Water, L. & P. Co. v. Anderson, (Tex. Civ. App. 1922) 244 S. W. 571.


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is entitled to protection when he enters upon parts of premises open at the time to the public. He is a representative of the public; and while no doubt he does not come for the purpose for which the place is thrown open, he still may have reason to think that he is included among those for whom it is provided, and that he may enter in the expectation of safety. It may be suggested that a policeman calling during business hours at a store or an office to make an inquiry should be classed as an "invitee." where if he comes at midnight, or enters by the fire escape, or in pursuit of a criminal, he is not.

CONCLUSION

It is surprising how much may sometimes be discovered by reading the cases. When, in the development of a rule over the course of a century, the courts have assigned a particular reason for it, it need not necessarily be concluded that that reason is the only one, or that it is the right one; but surely it is entitled to respectful consideration, and to some attempt to discover what it means, and what may lie behind it. By and large the courts have not talked of business interest or expected financial gain; they have talked of invitation. Invitation is an unfortunate word, since it applies equally to the customer who is entitled to protection and the social guest who is not. It is unfortunate also in that it connotes some initiative on the part of the occupier; and one who is permitted to come in response to his own proposal to do work on the premises may still expect to be protected. But the idea which it conveys, of encouragement to enter under circumstances which carry an implied assurance of care taken to make the place safe for the purpose, is essentially sound.

The conclusions which it is hoped may be drawn from the foregoing discussion are these:

1. In the early cases dealing with the liability of the occupier, business interest and pecuniary gain had only incidental mention, and did not affect the decision.

2. The decisions which have turned on the presence or absence of business interest are few in comparison with the large number which cannot be accounted for on that basis.

3. When premises are thrown open to the public, the occupier assumes responsibility for their safe condition toward any mem-

ber of the public who may enter for the purpose for which they are open, regardless of whether he brings with him the hope of profit or "benefit."

4. When premises are 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. Visits for the performance of contracts, and for other economic advantage to the occupier, usually are made upon such implied assurance.

5. When premises are not open to the public, the individual is not entitled to protection where he does not enter under circumstances giving him reasonable assurance that the place has been made safe for him; and this is true whether or not he confers benefit upon the occupier.

6. The Restatement of the Law of Torts is wrong.\textsuperscript{215}

\textsuperscript{215}So also, in several particulars, is Prosser, Torts (1941) 626-630, 635-642. To that learned author, a thorough-going reprimand.