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Torts--Licensees and the Duty Owed Them

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of rent payments when the utility of the premises was totally destroyed for the lessee's business purpose.

It is submitted that the court adopted the correct interpretation of the statute. It is remedial in nature, and should be interpreted in a manner which will correct a condition that is unfavorable to the tenant. It is believed that the common-law requirement of total destruction of premises, before a tenant could be relieved, is too harsh. The Kentucky statute should be construed reasonably, in the light of modern business practices. It is so unusual for any building to be completely destroyed, that such a result should probably be excluded from consideration. It is reasonable to assume, in light of the intention of the General Assembly, that the word "destroyed" should be given a liberal meaning, favorable to the tenant. The word should describe an event which renders the premises useless for the purpose for which they were leased, for then their value and utility are truly "destroyed" as far as the tenant is concerned.

ROBERT A. PALMER

TORTS—LICENSEES AND THE DUTY OWED THEM.—Plaintiff, a minister, went to defendant's garage to solicit money from the proprietor. Plaintiff was told that the latter was on the second floor of the garage. An unidentified employee of defendant's led plaintiff to a freight elevator, the only method of reaching the second floor. With plaintiff aboard, the elevator ascended half-way, then suddenly dropped a foot or so, causing plaintiff to lose his balance and fall to the first floor. It developed that the elevator had fallen several times in the past, but that it had been recently repaired and was thought to be in perfect condition. Held: Judgment dismissing plaintiff's action affirmed. Ockerman v. Faulkner's Garage.¹

The court in this case was faced with two problems. First, it had to determine the status of the plaintiff, i.e., whether he was a trespasser, licensee or business invitee. Second, it was required to define the exact duty owed to a person of that particular status.

In determining the status of the plaintiff the court examined the purpose for which he was on the land. Ascertaining that he had come to solicit money for his own purposes—that there was no mutuality of business interest between the plaintiff and the defendant—the court applied the principles laid down in the Restatement of Torts, secs. 330²

¹ Ockerman v. Faulkner's Garage, 261 S.W. 2d 296 (Ky. 1953).
² RESTATEMENT, TORTS sec. 330 (1934): "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."
RECENT CASES

and 332, and concluded that plaintiff was a licensee, not an invitee. In this case it was reasonably clear that there was no mutuality of business interest between defendant and plaintiff. Although plaintiff's interest in the solicitation may have been a "business" one, the defendant's interest was not. At just what point the business interests of the occupant of the land and those of the solicitor coincide sufficiently to constitute a "mutuality of business interest" is not certain. This case, however, may be taken as authority for the view that a common interest in a religious organization is not within the definition. It is interesting to speculate whether the result would have been different if the plaintiff had been soliciting on the defendant's premises, but in response to a specific invitation. The Kentucky court has occasionally stated that a mere invitation converts one into an invitee. This invitation may be express, or as is more often the case, implied from a business relationship. But at any rate, it is the invitation, not the mutuality of business interests, that is the touchstone of the law, according to this viewpoint. It may be logically satisfying to hold that if one is on the land in response to an invitation he is an invitee, but the great weight of authority, including the Restatement of Torts, requires a mutuality of business interests and therefore militates against such a conclusion. Most Kentucky cases are in agreement with the majority rule, and it is hoped that the view to the contrary has been abandoned and that the Kentucky rule is now settled in accord with the majority view as expressed in the Restatement. The principal case is, of course, additional authority for the Restatement position.

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3 RESTATEMENT: TORTS sec. 332 (1934): "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." See especially Comment b, which makes it clear that a "mutuality of business interests" is required for the entrant to fall into the category of a business invitee. For other definitions which the court cited with approval, see WORDS AND PHRASES. (1940).

4 Would the result have been different if the plaintiff had been a solicitor for a private charity? Or for a civic boosters club, like the Chamber of Commerce? Or for an organization like the Automobile Association of America?


6 RESTATEMENT, TORTS sec. 332. Note that the Restatement defines its terms in such a way as to destroy this possibility of seduction by semantics. The Restatement uses the more precise term "business visitor" instead of the more common "business invited." Hence the fact that there is an "invitation" does not lead one to conclude that the entrant is an "invitee."

7 Brauner v. Leutz, 293 Ky. 406, 169 S.W. 2d 4 (1943); L. E. Meyers Co. v. Logue's Admin'r, 219 Ky. 802, 280 S.W. 2d 107 (1926). See also: Madisonville v. Poole, 249 S.W. 2d 183 (Ky. 1952); Durbin v. Louisville and Nashville Railroad, 310 Ky. 144, 219 S.W. 2d 995 (1949); Dodd Trucking Service v. Raney, 302 Ky. 116, 194 S.W. 2d 84 (1946); Kentucky & West Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W. 2d 537 (1942); Eggner v. Hickman, 274 Ky. 550, 119 S.W. 2d 633 (1938).
After demonstrating that, in its opinion, the plaintiff was a licensee, the court proceeded to describe the duty owed to such a person.

At most, Reverend Ockerman was a licensee to whom the garage owed no duty as to the condition of the premises other than that of not knowingly letting him run upon a hidden peril or wilfully or wantonly causing him harm. ... 9

There is a duty to refrain from wilful and wanton conduct even to trespassers. 10 Just what is this duty owed to licensees to refrain from "knowingly permitting him to run upon a hidden peril"? If by this the court means that the occupant will be liable only if he stands by and knowingly watches a licensee walk into a dangerous condition on the land, the duty owed to licensees becomes no higher than that which, according to some authorities, is owed to trespassers. 11 Or is the court attempting to state a view similar to that of the Restatement, sec. 342, 12 that the owner has a duty to warn a licensee of dangers of which the occupant has knowledge? Since the facts of this case did not require it, there was no need for the court to spell out all of the law on the subject of licensees, for example, whether or not there is a duty to discover the presence of licensees. But the court could have gone into more detail in stating the exact duty owed a discovered licensee. That they did not do so is particularly unfortunate since there is considerable doubt as to what the Kentucky rule on this question actually is.

The Kentucky cases fall into three general groups. The first holds that licensees are entitled to no greater protection than trespassers, 13 i.e., the occupant's only duty is to refrain from inflicting willful and wanton harm. The second group of cases goes to the opposite extreme and appears to say that certain types of licensees, namely those on the land in response to a direct invitation, are entitled to the same

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9 Supra note 1, at 297.
10 Prosser, TORTS 618; 65 C.J.S. 438 (1950); 38 Am. Jur. 774 (1941).
11 Prosser, supra note 10, at 614.
12 Restatement, TORTS sec. 342 (1934) "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he: (a) knows of the condition and realizes that it involves an unreasonable risk to them, and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits one to enter or remain on the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein."
degree of care as a business invitee, that is, that the owner has a duty to make a reasonable effort to discover dangerous conditions on the premises and to warn the entrant of their existence. A third group of cases adheres to the rule of the Restatement of Torts, that the occupant of land has a duty to warn of dangers of which he has actual knowledge.

A good deal of the court's opinion in the instant case was taken up in distinguishing Kentucky and West Virginia Power Co. v. Stacy, which permitted a licensee to recover when he was injured in an explosion resulting from one of defendant's employees carrying a torch into a room known to be filled with dangerous gas fumes. The Ockerman case is clearly distinguishable from the Stacy case since in the Stacy case the defendant knew of the dangerous condition, while in the Ockerman case, he didn't; the elevator was thought to be in good condition.

But the court distinguished the Stacy case on the ground that in that case there was an act of negligence subsequent to the discovery of the presence of the licensee, while in the Ockerman case there was only a passive acquiescence in the status quo. This is a possible distinction, but it has the disadvantage of lending support to the view that a licensee is owed no higher duty than a trespasser, since there is owed to trespassers a duty to refrain from acts of negligence subsequent to his discovery. The implication is that the court might have denied recovery under the facts in the Stacy case had the gas been detonated by any cause other than defendant's active negligence subsequent to the discovery of the licensee. The better rule, and that of the Restatement, would have permitted recovery even in that event since the defendant had failed to warn its licensees of a known dangerous condition, in this case, a room filled with gas fumes.

In conclusion, it is submitted that the result reached by the court in the Ockerman case is in accord with the weight of authority. Taking the majority view that the defendant had a duty to warn the plaintiff of known defects, there would still be no liability since the defendant was ignorant of the defective condition of the elevator. It is, however,

14 Young & Adm'r v. Farmers & Depositors Bank, 267 Ky. 845, 103 S.W. 2d 667 (1937); Leonard v. Enterprise Realty Co., 187 Ky. 578, 219 S.W. 1066 (1920). This is hardly surprising in the light of the discussion above which showed that the Court had occasionally indicated that one on the land in response to an invitation was an invitee.


16 291 Ky. 325, 164 S.W. 2d 537 (1942).

17 Supra note 1, at 298.

18 Restatement, Torts sec. 338 (1934); Prosser, supra note 10, at 614; 65 C.J.S. 444 (1950); 38 Am. Jur. 775 (1941).
unfortunate that the court did not spell out more precisely the exact duty owed a licensee. It is hoped that the court will straighten out the conflicting Kentucky law as soon as it is required to decide a case on this particular point, and will adopt the *Restatement* view on the subject, which seems to be the better view.¹⁹

TOM SOYARS