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Negligence - Invitees and Licensees - Duty of Owner or Occupier of Land to Third Person Accompanying Customer

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to do so would abridge the guarantor's right of revocation, a right often expressly protected by statute.[16]

But in the instant case, the controversy is between the principal debtor and the guarantor. Undoubtedly the principal debtor could bind the guarantor to his promise to make future advancements, if there were a consideration running between them. The doctrine of promissory estoppel may serve as a substitute for a consideration, if the principal debtor has acted in reliance on the promise.[17] The result of the application of these two rules, while logical, does create a limitation on the privilege of revoking from the promisor's standpoint, as the instant case illustrates. The same ruling could be applied in a commercial transaction, since the promissory estoppel rule, by definition, is not limited to charitable transactions.[18] It should be pointed out, however, that the courts have been reluctant to apply that rule to commercial transactions, the argument being that in such cases mere reliance upon a gratutitous promise is not a sufficient consideration to bind the promisor.[19] The result reached, in any event, seems to be in line with the hyper-generous attitude of the courts when dealing with charitable subscriptions.

GERRY GLASER

NEGLIGENCE — INVITEES AND LICENSEES — DUTY OF OWNER OR OCCUPIER OF LAND TO THIRD PERSON ACCOMPANYING CUSTOMER. — Plaintiff's husband parked his car near an unguarded grease pit on defendant's service station lot; the pit was obscured by another auto which blocked off the station lights. After completing his business, the husband waited in the station office for the plaintiff. She crossed the street and walked toward the wrong car, whereupon he directed her toward his car. She then changed her direction, took a few steps and fell into the pit. The Supreme Court, in affirming a directed verdict for the defendant, held that since the plaintiff was not within the class of business visitors, defendant had no duty to protect her from hidden defects. When her husband completed his business his status reverted to that of a licensee, and she had no greater rights than he. ROBILLARD v. TILLOTSON, 103 A.2d 524 (Vt. 1954).

Most authorities agree that a business invitee must be someone on the premises with an express or implied invitation, and must benefit the owner actually or potentially.[1] The licensee, in contrast, is on the premises by permission or sufferance only; anticipated benefit to the owner from his presence is not necessary.[2] The duty of the landowner to a business invitee

16. N.D. Rev. Code (1943) §22-0106 provides: "A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor. An absolute guaranty is binding upon the guarantor without notice of acceptance."

17. *See* Florida Asphalt Pavement Co. v. Federal Reserve Bank of Atlanta, 76 F.2d 326 (5th Cir. 1935); Restatement, Contracts §75(2) (1933).

18. See note 1 *supra*.

19. Kirksey v. Kirksey, 8 Ala. 131 (1845). ". . . If generally applied it [promissory estoppel] would much extend liablility on promises, and that it is at present opposed to the great weight of authority." 1 Williston on Contracts 502 (Rev. ed. 1936).

1. *See* Restatement, Torts §332 (1934); Prosser, Torts §79 (1941); 65 C.J.S., Negligence §43(1).

2. *See* Restatement, Torts §330 (1934); Prosser, Torts §78 (1941); Cooley, Torts §340 (Throckmorton's ed. 1930).

is to make the property reasonably safe in anticipation of his visit and to notify him of any dangerous conditions,[3] while his duty to the licensee is to refrain from harming him wilfully or wantonly,[4] or from setting traps for him,[5] or from injuring him by active negligence after his presence is known.[6]

It seems clear that since an unguarded grease pit is a dangerous condition, the defendant in the instant case was under a duty to notify any business invitee of its presence. The plaintiff's husband was a business invitee when he parked his auto and went into the station office to make his purchases. It remains, then, to determine whether he continued to be an invitee after his presence ceased to benefit the owner, and whether the status attached to the wife.

Wives,[7] children,[8] and friends[9] have often been considered entitled to the protection owed an invitee, largely on the grounds that the visitor might not be there unless the guest accompanied him;[10] or that the guest is included for the convenience of the invitee.[11] More specifically, such elements as the tender age of the guest,[12] or a subsequent expressed invitation by the owner[13] or a showing that the invitee is entitled by the inherent character of the business to bring guests along[14] have been considered requisite. Some authorities also give weight to various possible business advantages from the guest's presence.[15]

If the plaintiff had accompanied her husband to the service station she undoubtedly would have assumed his invitee status because of the usual

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3. *See* Bohlen, *Studies in the Law of Torts* 183 (1926); 38 Am. Jur., Negligence §96.

4. *E.g.*, McMullen v. M & M Hotel Co., 227 Iowa 1061, 290 N.W. 3 (1940); Leuci v. Sterman, 244 Mass. 236, 138 N.E. 399 (1923); Boneau v. Swift & Co., (Mo. App.), 66 S.W.2d 172 (1934).

5. *E.g.*, Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940); A "Trap" is a danger which a person who does not know the premises could not avoid by reasonable care and skill. Alabama Great Southern Ry. Co. v. Campbell, 32 Ala. App. 348, 26 So.2d 124, 126 (1946).

6. Kakias v. United States Steel Co., 214 F.2d 434 (3rd Cir. 1954); Lewko v. Chas. A. Krause Milling Co., 179 Wis. 83, 190 N.W. 924 (1922); *see* Roadman v. C. E. Johnson Motor Sales, 210 Minn. 59, 297 N.W. 166, 169 (1941).

7. Davis v. Ferris, 29 App. Div. 623, 53 N.Y.Supp. 571 (1898); Welch v. McAllister, 15 Mo. App. 492 (1884).

8. Wheaton v. Goldblatt Bros., Inc., 295 Ill. App. 618, 15 N.E.2d 64 (1938); Gulf Refining Co. v. Moody, 172 Miss. 377, 160 So. 559 (1935); Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. 1954). *Contra*: Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 118 S.E. 697 (1923) (Child held to be licensee but recovered under "attractive nuisance" theory); Fleckenstein v. Great Atlantic & Pacific Tea Co., 91 N.J.L. 145, 102 Atl. 700 (1917).

9. Johnson v. Glasier, 40 S.D. 13, 166 N.W. 154 (1918); see also, Wingrove v. Home Land Co., 120 W.Va. 100, 196 S.E. 563, 566 (1938); *contra*: Morse v. Sinclair Auto Serv. Corp., 86 F.2d 298 (5th Cir. 1936).

10. Prosser, Selected Topics on the Law of Torts 271 (1953).

11. Prosser, Torts 637 (1941).

12. "The same duty which the owner owes to his customer he likewise owes to the customer's child". Miller v. George B. Peck Dry Goods Co., 104 Mo. App. 609, 78 S. W. 682 (1904); *accord*, Grogan v. O'Keefe's, Inc., 267 Mass. 189, 166 N.E. 721 (1929); Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941).

13. Gordon v. Freeman, 193 Minn. 97, 258 N.W. 19 (1934); *see* Kennedy v. Phillips, 319 Mo. 573, 5 S.W.2d 33, 37 (1928) (Guest was considered an invitee in his own right after presence acknowledged).

14. Kelley v. Goldberg, 288 Mass. 79, 192 N.E. 513 (1934); *see* Wingrove v. Home Land Co. 120 W.Va. 100, 196 S.E. 563, 566 (1938).

15. *See* Kennedy v. Phillips, 319 Mo. 573, 5 S.W.2d 33, 38 (1928) (Court concluded the guest was an invitee in his own right because of the possibility that he might purchase something); *see* Restatement, Torts §332 comm. C.

practice of service stations to make services available to customers and guests alike.[16] Would the plaintiff acquire the business invitee status when she came to meet her husband later, instead of accompanying him, irrespective of whether she arrived before, during, or after the business was consummated? Is meeting an invitee a purpose for which a service station is thrown open?

The instant court concluded that the husband's status as a business visitor ended when after he had completed his business he choose to remain in the office and wait for his wife. The invitation, expressed or implied, did not contemplate his use of the premises as a waiting place.[17] Presumably, the visitor would be "protected", under this view, only for a length of time sufficient for him to reach his auto and drive away.[18]

The preferred position of an invitee can be changed to that of a "mere", "bare" or "gratuitous" licensee while he is on the premises.[19] This conversion, however, has traditionally resulted from a venture into a restricted area,[20] or some other conduct of the invitee beyond the spirit of the invitation.[21] Some cases do hold that waiting beyond a reasonable length of time also converts the invitee into a licensee.[22]

The court in the instant case did not state whether the plaintiff would have been entitled to compensation had her husband retained his status of a business invitee. It merely concluded that under the circumstances presented, the status of the principal governed.[23] Thus the guest's status is derivative rather than of his own right. A rigid application of this rule might require that if a child accompanied its parent shopping and the parent went into a restricted area, thus becoming a licensee, and the child was injured outside the restricted area, the child would be denied recovery because of the parent's frolic. Had the wife, in the instant case, joined her husband *before* conclusion of his business, application of this "status by derivation" theory would enable her to recover.

LOUIS R. MOORE

INSURANCE LIMIT OF LIABILITY — MEANING OF "EACH ACCIDENT". — Plaintiff's truck was negligently operated so as to collide with a freight train and damage sixteen cars owned by fourteen separate companies. Plaintiff's insurance contract obligated defendant insurer to pay $5,000 property damage for "each accident" involving the insured. After suit was brought against

16. *See* Wingrove v. Home Land Co., 120 W.Va. 100, 196 S.E. 563, 566 (1938) "It would be strange indeed if the owner of an automobile driving into a filling station with members of his family, or with selected and invited guests, would be held to be an invitee, and the other occupants mere licensees."
17. Instant case at 528-9.
18. *See* Prosser, Torts §79 (1941) (Invite has right to safe exit).
19. *See* Prosser, Torts §79 (1941); 65 C.J.S. Negligence §46 p. 535, note 35.
20. *E.g.* Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1943); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 190 N.W. 99 (1922); Pellicot v. Keene, 181 Md. 138, 28 A.2d 826 (1942).
21. Southwest Cotton Co. v. Pope, 25 Ariz. 364, 218 P. 152 (1923); Lerman Bros. v. Lewis, 277 Ky. 334, 126 S.W.2d 461 (1939); *see* Hickman v. First Nat. Bank of Great Falls, 112 Mont. 398, 117 P.2d 275, 277 (1941); Prosser, Torts §79 (1941).
22. Heinlein v. Boston & P. R. Co., 147 Mass. 136, 16 N.E. 698 (1888).
23. *See* Meyer v. Manzer, 179 Misc. 355, 39 N.Y.S. 5, 7 (1943).