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NEGLIGENCE-DUTY OF CARE-AUCTIONEER AS OWNER OR OCCUPIER OF LAND

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NEGLIGENCE—DUTY OF CARE—AUCTIONEER AS OWNER OR OCCUPIER OF LAND—Plaintiff, while attending an auction conducted by defendant, purchased a large kitchen cabinet. As her sons attempted to remove the cabinet, their negligent handling of the piece caused the top half to become dislodged and to fall on the plaintiff, injuring her seriously. Defendant, a veteran auctioneer, was in full control of the auction and the area in which the injury occurred, and had invited the public to attend by means of advertisements. He had offered the sons no assistance, nor had he given the crowd warning of their dangerous activity. On appeal from a judgment for plaintiff, *held*, affirmed. The supreme court said: "For the purposes of the auction the defendant assumed the position of owner or occupier of the premises in question"; and "Consequently the defendant owed her (his business invitee) the duty to use reasonable care to protect her against dangers reasonably to be apprehended."¹ This duty was said to extend to all parts of the premises which he knew or should have known his invitees would customarily occupy. *Blackman v. Rowe*, (N.H. 1950) 72 A. (2d) 460.

The holding of the principal case that an auctioneer is, for the purposes of the auction, the owner or occupier of the premises raises two important basic considerations. The first is: should an auctioneer be held to be the occupier of the premises? Although the authority which the court cites² does not appear to warrant an affirmative reply to this question, the court still may be justified in reaching such a conclusion. The standard definition of the word "occupier" includes a "possessor";³ indeed, the *Restatement of Torts* would indicate that the word "possessor" may be used interchangeably with "occupier."⁴ It would appear, therefore, that if the auctioneer is exercising acts of ownership with intent to exclude similar acts by others, he may be said to be in possession;⁵ although perhaps the court should treat the elements of possession leading to occupancy as a question of fact, rather than holding auctioneers as a class to be occupiers as the

¹ Principal case at 462.

² *Frear v. Manchester Traction, Light and Power Co.*, 83 N.H. 64, 139 A. 86 (1927). In this case the defendant leased land to a negligent lessee. It is difficult to see that the actual owner of the land could be compared with an auctioneer, who is, at best, only a temporary possessor.

³ BLACK, LAW DICTIONARY, 3d ed. (1933); BOUVIER'S LAW DICTIONARY (1914).

⁴ 2 TORTS RESTATEMENT §329a (1934).

⁵ 1 TIFFANY, REAL PROPERTY, 3d ed., §§20, 94 (1939).

court appears to do in the principal case. If, however, one accepts the proposition that the auctioneer is a possessor and occupier, then the second question arises: what is the nature of the duty of care to be required of him? By holding him to be in the position of an occupier or owner, the court places on the auctioneer the many duties owed by the occupier or owner to business invitees. In the principal case, the court is concerned with the duty owed to invitees to guard against unreasonable risks resulting from negligent acts of third persons which could have been prevented by controlling their activities or by warning the invitee of the danger. On this question it would not seem unreasonable to hold the defendant owed such a duty based upon either an "economic benefit"⁶ or "invitation"⁷ theory of liability.⁸ The *Restatement of Torts* recognizes that such a duty is placed upon the possessor of land.⁹ In the principal case, where there is a breach of duty to guard invitees against dangerous activities on the land, the language used by the court is correct. But a problem would arise in attempting to apply the rule laid down to cases arising out of a breach of a duty based upon an occupier's duty to repair. When one gets into this latter area of duties, it becomes apparent that to impose upon the temporary possessor the duty to inspect, repair, and maintain would be rather harsh indeed, and would approach strict liability. It might be more reasonable to impose upon him only the type of duties imposed upon lessees of land leased for the admission of the public.¹⁰ This would still give the invitee protection against unreasonable risks as to the activities of the defendant, and yet would protect the defendant by not allowing the owner to shift his duty to repair and maintain the premises to the auctioneer who is only in possession for a very limited time and purpose.

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⁶ The prevalent theory of the basis of the liability of a landowner to persons on the land is that the duty imposed towards such persons is the price paid for the economic benefit which the landowner derives, or expects to derive, from the presence of the visitor. PROSSER, *TORTS* 637 (1941).

⁷ A second theory of a landowner's liability is that he impliedly represents to those whom he encourages to come onto his premises to further a purpose of his own that he has exercised reasonable care to make the premises safe for such persons. PROSSER, *TORTS* 638 (1941).

⁸ PROSSER, *TORTS* §79 (1941); *Markman v. Fred P. Bell Stores Co.*, 285 Pa. 378, 132 A. 178 (1926); *Durning v. Hyman*, 286 Pa. 376, 133 A. 568 (1926).

⁹ 2 *TORTS RESTATEMENT* §348 (1934).

¹⁰ PROSSER, *TORTS* §81 (1941); *Swords v. Edgar*, 59 N.Y. 28 (1874); *Junker v. Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915).