Chapter 2: Landlord and Tenant

Edward L. Schwartz
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Landlord and Tenant

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A. DECISIONS

§2.1. Option to renew: Implied covenant in sublease. In *Hook Brown Co. v. Farnsworth Press, Inc.*,¹ a sublessee was held entitled to specific performance of an oral agreement to sublease a portion of a floor. After holding that a very sketchy letter signed by the lessor² satisfied the statute of frauds, the Supreme Judicial Court then ruled that the words “we will lease to you for one year renewable” should be interpreted in the light of the oral conversations and so construed meant that the sublessee could, at its option, lease for successive one-year periods, but in no event longer than the date of expiration of the major lease because any other construction would be unreasonable.⁴ The Court permitted resort to parol evidence because the letter was not a formal, integrated document but merely a memorandum of the oral agreement.⁵ If the letter had been “integrated,” the Court would have been bound by prior decisions to construe the words “one year renewable” to mean a sublease for one year with an option to renew for a like period on the same terms and conditions except that no further option would be imported.⁶

The Court also stated:

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² “In accordance with our conversation, November 20, 1961, we will lease to you space on the ninth floor as discussed . . . on Monday, November 21, 1961. We will lease to you for one year renewable . . . at the rate of 60¢ per square ft. per annum.”
³ A plan of the space to be subleased was delivered to the sublessor in the course of negotiations, the Court stating that it was incorporated by reference into the letter memorandum.
⁴ The oral understanding was that the sublessee was to have “one year renewable” by which the sublessor meant “as long as you want.”
⁵ If the sublessee knew the date of expiration of the major lease, then it must be taken by implication that his sublessor could and would only sublease until the expiration date of the overlease.
⁶ The Court in effect states that it is a question for the trial court whether the letter was intended to be the lease itself or merely a memorandum of the oral understanding. The trial judge “concluded” that it was merely a memorandum. As such, the Court found that it complied with the statute of frauds.
As Hook must have taken its sublease with knowledge that Farnsworth would have a principal lease of the type usually granted by [the major lessor], the sublease should have required Hook so to conduct itself as to comply with the provisions in the principal lease governing use of the premises. See Wheeler v. Earle, 5 Cush. 31, 35; Miller v. Prescott, 163 Mass. 12, 13; Swaim, Crocker's Notes on Common Forms (7th ed.) §§747,759.7

The clauses relative to use usually found in leases are the requirement to use the premises only for a stated purpose,8 and “not to carry on any trade or occupation . . . or make or suffer any use . . . which is offensive, improper, noisy or contrary to law or ordinance, injurious to any persons or property, or liable to invalidate or increase the premium for any insurance on the building or liable to render necessary any alterations or additions to the building.”9 [Emphasis added.] In Wheeler v. Earle10 and Miller v. Prescott,11 the major lease contained the restriction not to make or suffer the prohibited use, and in each case the Supreme Judicial Court held that this empowered the major lessor to enter to terminate the major lease for breach by the sublessee even though the major lessee (the sublessor) knew nothing about the wrongful use.12 If the major lease in the Hook case contained the words “or suffer,” then the result would naturally follow from the cited cases because otherwise the sublessor would be helpless to stop acts of his sublessee which would constitute a default under the major lease, and it would not be a hardship on the sublessee to imply a covenant in the sublease not to violate the restriction in the major lease whether or not the sublessee knew of it when he executed the sublease.13 However, the Court in the Hook case seems to go beyond this. Mere knowledge by the sublessee that his sublessor would have “a principal lease of the type usually granted” by the major lessor was held sufficient to imply a covenant in the sublease not to violate the restriction in the major lease.14

8 See Schwartz §§4.1-4.7.
9 See Schwartz §§7.35-7.37, 7.40 nn.9-12.
10 See note 7 supra.
11 Ibid.
12 Termination of the major lease would terminate the sublease. Schwartz §9.20 n.5. The sublessee could not in good conscience assert such termination as a breach of the usual covenant against quiet enjoyment.
13 In Wheeler v. Earle, 5 Cush. 31 (Mass. 1849), the Court stated that the sublessee took only the title of his sublessor, and therefore took subject to the restriction. In Miller v. Prescott, 163 Mass. 12, 39 N.E. 409 (1895), the Court said that the only way to give effect to the word “suffer” in the major lease was to treat it as a stipulation by the lessee that there shall be no wrongful use by anyone occupying under him.
14 There was only a sketchy agreement in the Hook case. If a lengthy, detailed
the covenant will be implied whether or not the provisions relative to use require the lessor not to make or suffer specified uses, and whether or not stated negatively, then a sublessee with knowledge of the major lease will be bound by a major lease provision that the "lessee" will use the premises only for a specified purpose as well as by a restriction in the head lease "not to make" any offensive or other use, even though the sublessee is not in privity with the major lessor. This would seem to extend the Massachusetts rule beyond that previously understood, and in effect requires the sublessee to assume the obligations of the major lease with respect to use of the premises.

It is to be noted, however, that the covenant will probably not be implied in a detailed sublease in which all desired contingencies seem to have been considered by the parties. Moreover, the case leaves open the question as to whether other covenants will be implied in the sublease; e.g., a covenant to pay taxes or to repair contained in the major lease and of which the sublessee had knowledge.

§2.2. Fraudulent misrepresentations: Surrender. Prior to Kabatchnik v. Hanover-Elm Bldg. Corp., the rule of caveat emptor was liberally applied in Massachusetts to exempt an overreaching vendor from liability for false statements as to value and similar matters, on the ground that he was merely indulging in sales talk or expressing an opinion upon which the vendee had no right to rely. In Kabatchnik the Supreme Judicial Court held actionable a false statement by the defendant to his prospective lessee that another person would lease at the rental demanded by the defendant, and thereby as the Court admitted aligned itself with the more modern, majority view. In Pepsi-Cola Metropolitan Bottling Co. v. Pleasure Island, decided during the 1965 Survey year, the United States Court of Appeals for the First Circuit, relying on Yerid v. Mason, wherein the Court stated that it was still the law in Massachusetts that "false statements of opinion, of conditions to exist in the future or of matters promissory in nature are not actionable," quite properly refused to excuse a lessee who complained that he had been induced to sign a lease at $25,000


See note 14 supra.


344 F.2d 617 (1st Cir. 1965).

a year upon the false representation that a competitor would do so if he failed to sign. The representation actually amounted to no more than a truthful statement that the competitor's local officials had approved such a lease, coupled with the statement by the lessor's representative that a vice-president of the competitor had traveled from the home office to Boston to sit in on the negotiations and would go back and procure official approval. This was no more than a prediction of events which the lessor could not control.

The *Pepsi-Cola* case also involved the question of surrender, the lessee defending against a claim of breach on the ground that the lessor continued to operate a theater on the premises, as the lessee had done, after the lessee had vacated. The Court found, however, that the lessor's motive in operating the theater was to protect its investment in the park in which the premises were located. Moreover, the premises continued to be available to the lessee and the facts indicated no intention to exclude the lessee. The Court properly cited *Bandera v. Donahue* and *Roberts v. Wish* as authority.

§2.3. Statutory notice to quit. In *United States v. Farese*, the agent of a lessor of two stalls in a garage admitted federal agents to one of the stalls and permitted them to examine an automobile which had been left by his lessees. The present case involved a motion by one of the lessees, subsequently convicted of stealing the car, to suppress any materials taken from the car prior to his indictment on the ground that no search warrant had been obtained. Rent had been paid to January 27 and the federal agents made their visit on January 30. The lessor's agent had not obtained the name or address of the defendant. The court ruled that

the tenancy at will had terminated by virtue of the landlord's exercise of his right of reentry and his reassertion of control of the stalls; that the landlord was excused from the requirements of Mass. G.L. ch. 186, sec. 12, since there was no way of knowing to whom or where notice should be sent, and that this statute did not provide the exclusive mode of determining the tenancy in this situation; that on January 30 neither defendant had any right to exclusive occupancy or possession ...; that both stalls were left unlocked and unpaid for; ... that ... the owner, acting through his representative ... was conducting himself reasonably in causing physical examination of the ... car to be made in the hope that it would furnish a clue to the identity of the strangers who had made the rental; ... that ... there was little likelihood that the defendants would return.

4 *265 Mass. 179, 163 N.E. 892 (1928).
5 *Id.* at 575.
6 The statute provides for termination of a tenancy at will on 14-days notice for nonpayment of rent. G.L., c. 186, §11, contains a similar provision relative to leases.
It is submitted that the court’s conclusion that there had been no unlawful search or seizure was probably correct because the automobile appeared to have been abandoned. It is doubtful, however, whether it is correct to state that the fourteen-day notice is dispensed with merely because the lessor does not know where or to whom to send the notice, or to conclude that a tenancy at will can be determined by entry because the statute does not provide an exclusive mode of determining the tenancy. It would seem clear that if a tenant at will went off on an extended trip, leaving no address and locking the doors and leaving his furnishings behind and no one on the premises, that delivery of a notice to the premises would be insufficient, and entry even for nonpayment of rent would be ineffective to terminate the tenancy. However, if the lessee abandoned the premises, entry by the lessor would constitute acceptance of a surrender by operation of law.

§2.4. Lease to Commonwealth: Condition precedent. A lessee of a public building or lessor of space to the state or a municipality must not only make certain of compliance with applicable laws, ordinances or by-laws as to the authority of the official executing the lease, but must also abide by express limitations on the length of the term or other provisions of the lease. In United States Trust Company v. Commonwealth, the Supreme Judicial Court was called upon to determine which of two statutes, General Laws, Chapter 8, Section 10A, or General Laws, Chapter 29, Section 26, governed the liability of the Commonwealth to restore the premises on termination of a lease of several floors in the building owned by the plaintiff bank. The lease provided in part: “THE LESSEE AGREES that it will, subject

A tenancy at will may also be terminated by a notice equal to the interval between rent payments under G.L., c. 186, §12, usually one month.

§2.4. 1 Schwartz §§2.13 nn.2-5; 2.14; 6.15 nn.22, 23.
2 G.L., c. 8, §10A (state); Commercial Wharf Co. v. City of Boston, 208 Mass. 482, 94 N.E. 805 (1911) (municipality).
3 General Laws, c. 40, §§; id., c. 29, §26 (maximum term 5 years). As to other limitations see, for example, Schwartz §6.15 nn.22, 23 (real estate taxes on leased public lands must be paid by lessee).
5 “The Commonwealth, acting through the executive . . . head of a state department . . . and with the approval of the superintendent and of the governor and council and of the commission on administration and finance, may lease for the use of such department . . ., for a term not exceeding five years, premises . . . if provision for rent . . . has been made by appropriation.”
6 “No obligation incurred by any officer . . . of the commonwealth for any purpose in excess of the appropriation . . . for such purposes . . . shall impose any liability on the commonwealth.”
to available appropriation, at its expense, prior to the termination of this lease, restore the . . . premises. . . .” [Emphasis supplied.] The Court ruled that General Laws, Chapter 29, Section 26, was of general application but that General Laws, Chapter 8, Section 10A, and only the latter statute, governed leases and that authority to “lease” includes not only the power to pay rent but also to incur other obligations, including the power to restore. Any other interpretation would be absurd. If the legislature intended to qualify the power to lease by limiting the authority of the state official to restore, it could have expressly so provided in the General Laws, Chapter 8, Section 10A,7 and lessors dealing with the Commonwealth would then be able to take appropriate measures in negotiating with the state.

The Court then peremptorily dismissed the contention that “subject to appropriation” in the lease imposed a condition precedent to the obligation to restore by stating simply that “the words do not create a condition precedent to obligation.” The Court apparently construed the words as meaning no more than that restoration would be made when (but not if) funds became available.

§2.5. Lessee’s obligation with respect to outside premises. The lessee’s obligation, in the absence of agreement, is to commit no waste to the leased premises.1 The duty does not extend to other areas2 in the absence of agreement.3 In this posture of the law, First Safe Deposit Bank v. Western Union Tel. Co.4 represents a surprising (and expectedly unsuccessful) attempt on the part of a lessor and other tenants to fasten liability on a tenant for a fire which resulted from a short circuit in a cable in a part of the building outside of the demised premises, merely because the cable serviced the defendant exclusively. The cable had not been installed by the defendant, was not owned by it, and there was no evidence that defendant knew that its electricity came through this particular cable, nor was there any practice of inspecting cables. There was additional evidence that the fuse which controlled the electricity to this cable was oversize but the fuse box (which was in a common hallway) would only take oversize fuses and there was no evidence that the defendant had installed the fuse box.5 Under these facts, the plaintiffs’ contention that the defendant knew or should have known of deterioration in the cable and was responsible therefor could not be sustained.6

7 Cf. G.L., c. 59, §11, which requires the lessee to pay for real estate taxes on leased public land.

§2.5. 1 Schwartz §7.11.
3 Cf. Schwartz §§7.31 nn.20-23; 7.32 n.20; 8.12-8.16.
4 337 F.2d 743 (1st Cir. 1964).
§2.6. Lessor's obligation with respect to demised premises. Liability for defects ordinarily depends upon control. Accordingly, when premises are leased to a lessee, the lessor will be excused from liability for injury or damage thereafter occurring in or as a result of a defect in the demised premises unless the plaintiff can bring the case within a narrow category of exceptions. In the 1965 Survey year, three cases, Carney v. Bereault,1 Baldassare v. Crown Furniture Co.,2 and Boothman v. Lux,3 involved attempts to bring the facts within these exceptions.

(a) In Carney v. Bereault,4 a garage including equipment was leased by the defendant Gulf to the defendant Bereault. A business invitee of the lessee was injured when an automobile rolled off an allegedly defective lift. The lease provided that the lessee was to "keep said premises... equipment... in good condition and repair" and not "paint... the buildings or... equipment... (nor) make alterations, additions or changes...." Control was disclaimed by the lessor, viz: "None of the provisions of this lease shall be construed as reserving to the Lessor any right to exercise control over the... business... of the lessee...." There was evidence that the lessor's servicemen had repaired the equipment from time to time and had repaired the lift about two weeks prior to the accident. The jury found for the plaintiff against the lessee but a verdict was directed in favor of the lessor, and the plaintiff appealed. The Supreme Judicial Court ruled in favor of Gulf. After pointing out, without citation,7 that "[t]his is not a case where the landlord has retained control of a portion of the premises,"8 the Court indicated that the plaintiff's rights were derivative from the lessee and therefore could claim no greater right than the latter,9 and proceeded to determine what rights the lessee would have had against the lessor. The Court stated that the clause prohibiting alterations by the lessee10 did not shift the burden of making repairs to the lessor; that in the absence of a contractual obligation to repair the lessee would be liable only for gross negligence in making

41965 Mass. Adv. Sh. 257, 204 N.E.2d 448, also noted in §5.4 infra.
5As to the lessor's rights if lessee fails to comply with this and like restrictions, see Schwartz §7.36 n.3.
6The plaintiff sued (1) the manufacturer of the lift for alleged defects in manufacture, (2) the lessor of the garage, (3) the lessee, (4) the serviceman, and (5) the owner of the catapulting automobile.
10See text supported by note 5 supra.
repairs; and that, even if a contractual obligation to repair had been proved, breach thereof would subject the lessor to liability in tort to the plaintiff for the defect only if he had agreed to keep the premises in safe condition. 12

The Court concluded by dismissing "[t]he only other theory upon which the plaintiff might recover . . . [viz] that the lift was in a dangerous condition at the time of the demise of the premises." Ordinarily, there is no implied covenant of fitness when a lessor demises premises. 13 One exception 14 is a latent defect which exists at the commencement of the tenancy and which the lessor knows 15 exists and fails to disclose to his tenant. 16 But the plaintiff would have had the burden of proving each of these facts and the evidence did not sustain this theory.

The Court also considered and dismissed the liability of the manufacturer of the lift for alleged defects in manufacture. 17 Of interest in this connection was the Court's statement that it would not overrule the trial court's exclusion of a question as to commercial standards established by manufacturers, because "'[o]ur cases have long held that evidence of a general practice or what is customarily done by others may in the judge's discretion be received on the issue of negligence.'" 18

(b) In Baldasarre v. Crown Furniture Co., 19 also involving lease of an entire building, the plaintiff, whose intestate was a traveler on the highway killed when the building collapsed, tried to fix responsibility on the lessor under the "contemplation" 20 doctrine of Whalen v. Shivek, 21 which the Supreme Judicial Court paraphrased as follows:

[the lessor] could be found to be liable for any condition of the

12 Fiorntino v. Mason, 233 Mass. 451, 453-454, 124 N.E. 253, 283-284 (1919). See Miles v. Janvrin, 196 Mass. 431, 433, 82 N.E. 708, 708-709 (1907). If there is merely an agreement to repair, as opposed to one to keep in safe condition, then a breach of agreement will subject the lessor to liability only in contract, and then only to his covenantee, the lessee; and, unlike the Fiorntino type of covenant, notice in the latter case to the lessor is a condition precedent to his liability. Schwartz §7.2 nn.20-23.
14 Schwartz §3.10.
15 Or should have known, Schwartz §3.10 n.7.
17 Under the doctrine of Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946). There is a good discussion of the limitations on the application of the rule of that case.
20 Schwartz §7.31 n.14, which also discusses the related doctrine of "continuing nuisance."
building constituting a nuisance and a source of danger to persons using the sidewalk below (a) which existed at the time of the letting . . . and (b) of which she knew or ought to have known. Her responsibility would not end with the lease. See Prosser, Torts (3d ed.) §65 at pp. 414-415, §70 at pp. 482-486. 22

This would be so even though the acts or omissions of the lessee and independent contractors performing work on the building intervened. However, there was no proof that the structural weakness was known or should have been known to the lessor when she leased the premises to the lessee, the only evidence being that signs of weakness appeared after the letting. Nevertheless, the Court found the lessor liable on the theory that she "at least shared in the control of the building and in the obligation to take precautions." 23 The Court based this conclusion on evidence that the lessor was related by blood and by marriage to the various officers of the corporate lessee; that the city had requested repairs; that she or her agents had conferred with city representatives about the building; and that applications for permits to do corrective work had been filed on her behalf by the engineer and the builder who had been hired by officers (her relatives) of the lessee. The building had been condemned unless it was made safe. She knew this, as did the lessee. The lessee had hurried the engineer and builder to complete the work and they prematurely removed most of the supporting jacks, causing collapse of the building. Under these circumstances, she and the lessee (even though not her agent) would both be liable as occupiers of real estate to travelers on the highway. The ease with which the Court reached the conclusion of control based upon the close relationship of the lessor and the lessee's officers, in an effort to reach an eminently desirable conclusion, makes one wonder why the Court has not also swept aside technical considerations in determining who has control in the common stairway cases. In those cases liability of the lessor is based upon deterioration in the common area after commencement of the particular tenancy, and a change in ownership of the property, no matter how technical, will be deemed to create a new tenancy and to relieve the transferee of liability. 24

(c) In Carney v. Bereault, 25 the Court stated that there is ordinarily

24 As in Auld v. Jordan, 340 Mass. 228, 163 N.E.2d 296 (1960), discussed in 1960 Ann. Surv. Mass. Law §1.1 (incorporation of lessor created charge of ownership which terminated tenancy at will relationship with L, and created a new one with L., Inc., for purposes of application of common stairway rule, even though L owned and controlled L., Inc., and lessee had no knowledge of the incorporation or transfer of the record title).
no warranty of fitness by the lessor with certain exceptions, one of which is a latent defect. The plaintiff in Boothman v. Lux26 attempted to capitalize upon another exception, applicable to a lease of a furnished apartment.27 The plaintiff had rented for one night (as he had done on other occasions) a fully furnished room on the second floor of the defendant's house. The second floor had a landing at the top of the stairway and a hallway area with a kitchenette and bathroom which plaintiff could use. Before retiring, the plaintiff went to the landing to see whether the downstairs light was out and slipped on a piece of soap wedged into a crack on the landing, falling downstairs. The defendant appealed from a verdict for the plaintiff. The Supreme Judicial Court stated that, since the case was tried on the theory that the plaintiff's lodging for one night resulted in a demise, it would deal with it on the same footing; i.e., as a demise of a furnished apartment to which the rule of Ingalls v. Hobbs28 was applicable.

There it was held that one, who lets for a short term of a few days, weeks or months a fully furnished house supposedly equipped for immediate occupancy as a dwelling without the necessity of any fitting up or furnishing by the tenant, impliedly agrees that the house and its appointments are suitable for occupation in their condition at the time.29 However, the Ingalls rule was not applicable because the landing was not part of the "demised" premises. "Because of this disposition of the case, we need not decide whether the piece of soap on the landing was such a defect within the Ingalls rule."30 The Court went on to say, by implication, that the night's lodging was merely a license to use the premises, to which the ordinary negligence rules applicable to a licensee of land,31 and not the rule of Ingalls v. Hobbs, would apply.

§2.7. Lessor's obligation with respect to common areas. (a) Mikaeloros v. Stamatoouras,1 decided during the 1965 Survey year, is a run-

27 See Schwartz §3.11. Cf. id. §3.12 (short term occupancy for a public purpose).
28 156 Mass. 348, 31 N.E. 286 (1892).
30 The basis of liability is contractual and the contract is made with the lessee and does not extend to his family or invitees. Schwartz §3.11 n.2. The defect must exist at the commencement of the tenancy. Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947); Chelefou v. Springfield Institution for Savings, 297 Mass. 236, 8 N.E.2d 769 (1942).
31 If this cryptic remark is intended to mean the rule does not apply to such a defect, there would seem to be no justification for it. The Ingalls case (note 28 supra) involved bugs which hardly constitute a "defect" in the usual sense.

§2.7. 1 1965 Mass. Adv. Sh. 481, 206 N.E.2d 62, also noted in §5.1 infra.
of-mill common stairway liability case which reaffirms that it was a question of fact whether (1) the downstairs rear hallway in a two-family house, where plaintiff had fallen, was a common passageway over which the landlord had retained control; (2) the landlord had impliedly undertaken as part of the letting to keep the hallway lighted and had failed to do so;2 (3) the plaintiff (who had been visiting the landlord's mother-in-law in the landlord's upstairs apartment) had ceased to be a social guest of the landlord at the time of the accident and had become the guest of the tenant, whose wife she was visiting on the date of the accident; and (4) there was a causal connection between failure to light the hallway and the injury.

(b) Underhill v. Shactman4 gave some relief from the harshness of the "common stairway" rule6 by distinguishing the case of a customer of a shopping center, injured by a defect in a common area, on the ground that the plaintiff was there by an implied invitation from the owner of the shopping center, and therefore would be afforded the same protection as any business invitee of an occupier of real estate.6 In Cronin v. Universal Carloading and Distributing Co.,7 decided during the 1965 Survey year, the Supreme Judicial Court likewise found an implied invitation by the railroad, owner and lessor of various portions of a freight house with a loading platform, to truckers to use the yard in making deliveries to the various tenants. However, the Court found no liability in these circumstances. The plaintiff, a truck driver who was making a delivery to the codefendant, a tenant of a defined area in the freight house, used a short cut, as other truck drivers were in the habit of doing, by climbing up some makeshift rungs nailed to the front of the platform (at a point outside of the premises leased to the codefendant), and was injured when one of the rungs broke. The Court said that proper stairs for access were available; that there was no evidence that the railroad had put the rungs up or that they were support timbers; and that the railroad's invitation did not extend to the use of the "ladder." The Court concluded by stating:8

2 There is no common law duty on the part of the landlord to light the common areas, or remove snow or ice or rubbish. Campbell v. Romanos, 346 Mass. 361, 191 N.E.2d 764 (1963). See Schwartz §7.3 n.5; Hall, Massachusetts Law of Landlord and Tenant §199 nn.5-9 (5th ed. 1949). Such a duty may be required by statute, which usually imposes criminal but not civil liability, id. §199 n.5, or as part of the contract of letting. Campbell v. Romanos, supra.

3 If the accident had occurred when the plaintiff was still a guest of the landlord, the duty of the landlord would have been only that of an occupier of real estate to a licensee, and the landlord would not have been liable in the absence of a showing of gross negligence. Prosser, Torts 387, 388 (3d ed. 1964).


5 The landlord has the duty to use reasonable care to keep the common areas in as good condition as they were in or appeared to be in at the time of the letting. Schwartz §7.5 n.5. See §2.6, note 24 supra. See also 1963 Ann. Surv. Mass. Law §1.12.


7 1965 Mass. Adv. Sh. 411, 204 N.E.2d 917, also noted in §5.1 infra.

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The railroad did not owe Cronin, with respect to any part of the yard as to which the invitation did not reasonably extend, the duty of care which it would owe to an invitee. ... Nor did the invitation extend to any type of use other than that reasonable in the circumstances. ... [Therefore it was] unnecessary ... to determine whether ... it could be found (a) that there was an indication prior to the accident of any defect ... or (b) that any defect had existed for a long enough time so that the railroad should have known of it and removed the timber. ...

It should be noted, in passing, that the Court dismissed a claim against the tenant on the ground that the defect was in an area not controlled by it.9

§2.8. Lessor's obligation with respect to other areas under lessor's control. Mason v. Lieberman,1 also decided during the 1965 Survey year, simplifies proof as to control, and at the same time creates confusion as to the legal consequences of that control. Although the roof services all tenants of a multioccupancy building because it is necessary for their shelter and protection,2 it does not follow that exclusive control of the same may not be given by the landlord to another3 or reserved to himself.4 Accordingly, it is not always easy for an injured plaintiff to establish the "situs" of control. In Mason v. Lieberman,5 the Supreme Judicial Court ruled that control of the roof may be presumed from mere ownership, and that the presumption is rebuttable only by affirmative proof that control is in another person. Having determined that control of the roof of the building in question was in the landlord, the Court then assumed without discussion that the "common passageway" rule6 was not applicable and held the landlord liable to the tenant of the second top floor of an extension of the building for damage to his goods caused by collapse of the roof. There were other tenants in the building but apparently none had access to the roof. Negligence was established by reason of the landlord's failure to take appropriate protective measures after having been given adequate notice of leaks. The Court quoted:

"Where no 'common passageway' is involved, the rule is that a person in control of a building, or of a part thereof, is required to exercise reasonable care to keep it in such condition that others will not be injured in their persons or property." Regan v. Nelson, 345 Mass. 678, 680. "This duty of due care extends as much to an occupant of another part of the same building, whether the negli-

9 See §2.5 supra.

2 Schwartz §7.3 n.4.
3 As in Yorra v. Lynch, 226 Mass. 153, 115 N.E. 238 (1917), where the roof was leased exclusively to a sign company.
4 Schwartz §7.4 n.1; cf. id. §3.20, Exceptions and reservations.
6 See §2.7, note 5 supra.

http://lawdigitalcommons.bc.edu/asml/vol1965/iss1/5
This is the rule applicable to an occupier of real estate. It is submitted this case either overrules prior decisions in this area, or must be limited to its facts.

In Cox v. Rothenberg and Williams v. Pomeroy the roof collapsed, damaging the plaintiff tenant's goods. The Court held that the common passageway rule applied but denied liability because the accident was vis major. In Sullivan v. Northridge, the Court found that the roof of a piazza, which serviced the plaintiff's apartment exclusively, was part of the main roof in the exclusive control of the landlord, and applied the common passageway rule in finding for the plaintiff for injuries suffered when the roof fell. In Devine v. Lyman, a drainpipe which drained water from the roof (found to be in the landlord's control) and which passed through the plaintiff's premises, lost a plug inside the demised premises, resulting in flood damage to the tenant's goods. The Court applied the common passageway rule. Other examples may be cited.12

On the other hand, the Court has shown a tendency to apply the "occupier of land" rule to certain areas in the lessor's control, such as vacant apartments, a tunnel adjacent to an exterior wall, a lot contiguous to the building and over which deliveries were made, and other areas. The Court seemed even to apply the "occupier" rule to a common hallway where fire had started in an accumulation of rubbish.17

The Court in Mason v. Lieberman cited Yorra v. Lynch. This case may provide a clue to the Court's ratio decidendi. In that early case, the landlord leased the "roof" to a sign company. The building was separated from the next building by a party wall which was higher than the roof of the other building. The Court said that it could be

18 Note 16 supra.
presumed that the party wall was built by the defendant owner, or his predecessor, and was in his control; that a lease of the roof to the sign company did not include the party wall; that the "common passageway" rule did not apply where an iron capping of the party wall fell, striking the plaintiff tenant who was looking out of her window at the time. The party wall in Yorra clearly did not service the various tenants, particularly because of the intervening lease of the roof to the sign company. Perhaps the Court in Mason believed that the roof over the extension was in a like category. If this is so, the Mason case can be limited to its facts. On the other hand, the Mason case may represent a revulsion of feeling from the harshness of the "common passageway" rule. The Court may be saying that recovery will be granted if injury results to the tenant or one claiming under him while using the demised premises, even if the injury results from a defect in a common passageway or like area. This would then leave subject to the common passageway rule cases where the plaintiff is injured while using the common area.

The only thing clear, however, is that the law is now in confusion. How much simpler it would be if our court, or the legislature, would abolish the obsolete common passageway rule and bring our law into harmony with that of other jurisdictions which apply the "occupier" rule even to common passageways.

B. Legislation

§2.9. Notice of lease. General Laws, Chapter 185, Section 71, has been amended by Chapter 37 of the Acts of 1965 to eliminate doubts heretofore expressed as to the effectiveness of filing of notices of leases relating to registered land. Commencing May 16, 1965, "leases or notices of leases," as defined in the General Laws, Chapter 183, Section 4, "of registered land for a term of seven years or more shall be registered in lieu of recording." [Emphasis supplied.] Left untouched, however, is the continuing discrepancy between the types of "seven year" leases subject to recordation or registration. General Laws, Chapter 183, Section 4, requires recording of leases "for more than seven years from the making thereof." [Emphasis supplied.] Technically, this could include a lease for one year, if it began more than seven years in the future.

§2.10. Automatic locking of doors. Chapter 464 of the Acts of 1965, effective January 1, 1966, adds another restrictive section (Section 3R) to the General Laws, Chapter 143. Main doors of apartment

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19 As in Yorra v. Lynch, note 16 supra.
20 Martin v. Christman, 320 Mass. 696, 71 N.E.2d 111 (1947) (plaintiff hanging clothes injured when she fell through rotted roof platform where clothes were hung by tenants).

§2.9. 1 Schwartz §5.11 nn.6-9.
2 Schwartz §5.11 n.2.
houses having more than three apartments other than lodging houses and dormitories will be required to lock automatically under penalty of a fine.

§2.11. Summary process: Eviction. The authority of the court to stay execution for a total of nine months in summary process matters is extended to June 30, 1967.¹