A. LANDLORD AND TENANT: VIOLATIONS OF BUILDING CODES:
FROM IMMUNITY TO RESPONSIBILITY

§5.1. Introduction: The legal background. At common law, the position of the lessee, members of his family, and his visitors was very desolating as far as any tort liability of the landlord for harm from defects in the leased premises was concerned.¹ Dolan v. Suffolk Franklin Savings Bank,² decided in the 1969 Survey year, is a welcome addition to the cascading crescendo of cases and commentary across the nation which advocate an amelioration of this status.

In the 19th century, landowners' economic interests were given paramount consideration. The courts of that period stamped approval of the general rule of the lessor's tort immunity by adopting the root concept that a lease was a sale of the premises for a term. Such a "jurisprudence of conceptions" meant that the landlord was subject to no liability for leasing premises in a dangerously defective condition because the heartless rule of caveat emptor applied, leaving the lessee blithely free to determine for himself the condition of the premises before making his uncoerced choice of whether or not to sign the lease.³ The only recourse of visitors, in turn, was against the lessee or occupier of the land.⁴ Nor was there any duty imposed on the lessor to keep the premises in repair after the tenant and his family moved in, for, under the talismanic immunizing phrase, there had been transferred an estate in the premises, and no matter how much the lessor may have been brimming with altruistic plans to repair, he had no right to enter.⁵

WILLIAM SCHWARTZ is Fletcher Professor of Law at Boston University Law School and general director of the American Trial Lawyers Association.

⁵ See 1 Tiffany, Landlord and Tenant 7 (1912); 2 Restatement of Torts §555; 2 Harper and James, Torts §27.16 (1956); Eldredge, Landlord's Tort Liability for Disrepair, 84 U. Pa. L. Rev. 467 (1936), reprinted in L. Eldredge, Modern Tort Problems 113 (1941).
An English judge succinctly summed up the dismal plight of the tenant and his family and servants at common law, “fraud apart, there is no law against letting a tumbledown house.”8 If a tenant, having seen that the premises were patently perilous and rife with risk, still wanted to rent, that was his affair. Fraud apart, about the only limitation or inroad on the landlord’s tort immunity was his liability for injuries caused by concealed defects of which he knew and failed to make disclosure. This exception was given a grudging and constrictive construction by courts under the flourishing myth that overborne tenants were omnicompetent people, dealing at arm’s length on a plane of legal parity, who might be expected to give the premises an intensive examination before renting them.7

In the last 90 years or so there has been a discernible shift from the rule of lessor’s immunity to an approach which makes the landlord primarily responsible for the safe condition of his premises, thus placing the duty of making repairs on the party better able to make repairs. Basic transformations in social and economic conditions led to an irresistible need for first breaching and then replacing most of the original common law immunity doctrine. Wider use of the short-term lease occurred because of greater mobility and stir of population. Changes in construction styles and patterns, increasing urbanization and the inflow from farm to city necessitated larger financial outlays to make repairs; and resulting urbanization proportionally increased the ratio of the population living in multiple dwellings, where the same defective condition might endanger more than one apartment family unit. The cumulative force of these factors led to a shifting of responsibility to the lessor by circumvention of the sales concept and to increasing breaches in the general common law no duty rules.

The inroads on the lessor’s immunity include: (1) concealed dangerous conditions known to the lessor; (2) conditions dangerous to those outside the premises; (3) premises leased for admission of the public; (4) the lessor’s covenant to repair; (5) negligence in making repairs; (6) portions of premises retained in lessor’s control; (7) statutes — frequently extended to multiple dwellings — requiring lessors to keep premises in good repair.8 The Dolan decision, the case under review, is concerned with the seventh exception or inroad on the lessor’s immunity. It deals with the effect of the landlord’s violation of the building code.

This brief survey of the legal background would be incomplete without note being taken of the recent Massachusetts decision of

---

7 See, e.g., Bowe v. Hunking, 135 Mass. 380 (1885) (where a tread on backstairs, which were enclosed and “not well lighted,” had been partly sawed through and painted over, the Court rigorously applied caveat emptor since this defect was discoverable by the tenant).
In that case, the Supreme Judicial Court held that an implied warranty of habitability exists in a lease of furnished premises for a term of nine months. There are at least four possible rationales for the short term, furnished premises exception. They are (1) it is a judicial attempt to narrow the ambit of the caveat tenant rule; (2) the short-term tenant of furnished premises has expectations regarding the uses of the premises that are deserving of legal protection; (3) the short-term tenant of furnished premises has less opportunity to make an inspection; (4) the short-term tenant of furnished premises is more apt to fall prey to unconscionable landlords.

§5.2. Housing conditions and the efficacy of existing remedies. A realistic approach to a resolution of the issues existent in this corner of the law must be predicated upon an appraisal of current housing conditions and the adequacy of existing remedies to improve the situation. Two commentators have observed:

Today, half a century after slum dwelling laws were widely enacted in response to public outrage, and a generation since the principle of public housing became operative, there remain vast numbers of urban housing units in which the most appalling living conditions continue to exist. Yet, it would be difficult to find a social wrong that has been more thoroughly and elaborately attacked in law. For example, New York, the first city of America in quantity and detestability of its slum dwellings... has at least five major legal devices designed to eliminate sub-standard housing: The owners of such housing can be criminally prosecuted; the offending building can be ordered vacated; rent can in some circumstances be withheld or abated; controlled rents can be involuntarily reduced; and the building can even be put into receivership, so that the city can make repairs and obtain a lien on rents to secure reimbursement. These are certainly strong—some might say Draconian measures; yet, despite their presence, abominable slum housing conditions persist in very great quantity.

In many of our urban centers, housing is deteriorating more quickly than it can be replaced. The 1960 Census of Housing reported that 24 percent of all occupied units were deteriorating, dilapidated or lacking some or all plumbing facilities.


§5.2. 1 Sax and Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869, 870-871 (1967).
2 See Message of the President of the United States Relative to the Problems and Future of the Central City and Its Suburbs, 111 Cong. Rec. 3908 (1965).
§5.2 PROPERTY AND CONVEYANCING

It has become economically impossible for private investors to provide new rental housing for low income groups; and subsidized public housing will take many, many years to fill the gap even if current rates of urban renewal and other construction are greatly increased. Hence we must improve the methods for maintaining our present housing supply in decent condition, or restoring it to minimal conditions of habitability where it has become unsatisfactory.4

Indeed, it has been observed that governments may be the worst slumlords. “[P]ublic housing projects built for the very purpose of substituting decent housing for the squalor of poor urban neighborhoods, can equal the worst of slums.”6

The sanction routinely relied upon for the past half century in many jurisdictions has been criminal prosecution.6 A recent study has revealed that:

The trouble with criminal prosecution for housing violations — as well as for the score, of other state and local regulations of health and safety — is that in hard-core cases it does not work. The remedy is inadequate as a cure or a deterrent; it does not result in repairs of buildings or in deterrence of recalcitrant owners. Furthermore, the sanction is fraught with procedural and conceptual difficulties that make it unsuitable as a contemporary code enforcement device.7

The authors of this study conclude that

... there ought to be substituted a new economic sanction namely, a mandatory civil penalty. This fine could be fixed by law at so much per violation per day, possibly graduated depending on the seriousness of the violation — the full cumulative amount to be recoverable by civil action, and, if not promptly paid by the owner, than collectible directly out of the building’s rents.8

In an innovative and somewhat revolutionary article, Sax and Hiestand expose existing remedies as suffering from four weaknesses9 and assert that

... traditional code enforcement principles tend to be self-defeating because they are largely built upon an erroneous economic

4 Gribetz and Grad, Housing Code Enforcement; Sanctions and Remedies, 66 Colum. L. Rev. 1254-1255 (1966).
8 See Gribetz and Grad, Housing Code Enforcement; Sanctions and Remedies, 66 Colum. L. Rev. at 1256.
7 Id. at 1276.
premise. The essential assumption of code enforcement must be that the private owner of low-cost substandard housing can be compelled to rehabilitate and still serve the same or similarly situated low-income tenants. All the evidence, however, points to the unlikelihood of any such result where major rehabilitation is required. 10

Sax and Hiestand conclude:

We believe that recognition of a substantial civil damage action—one which holds that the slumlord who illegally maintains his premises in indecent conditions commits an actionable tort—may be a key to the slum housing dilemma. It must seem ironic that the traditional tort action, so much maligned for its wastefulness, delay and cumbrousness, may be needed to supersede public enforcement, but we think that a tort remedy is precisely what is required. 11

Drawing an analogy to the recognized tort of the intentional infliction of emotional distress, they contend that slumlordism ought to be deemed a tort and that the law ought to allow a substantial civil damage action to be brought by a slum tenant subjected to living in indecent housing. It should be noted that this concept has not gone unchallenged. 12

Viewed against this legal, social and economic background, the holding in Dolan, that the violation of the building code is evidence of negligence, does not appear to be a giant step forward. Nevertheless, it is a positive contribution towards extricating Massachusetts' jurisprudence from the quagmire of aberrations which have prevailed in the landlord-tenant area for too long a period of time.

§5.3. The decision in Dolan v. Suffolk Franklin Savings Bank.

In Dolan, the defendant had held a mortgage on the premises which it foreclosed and under which it took possession, notifying the plaintiff (a tenant of the premises prior to the defendant's taking of possession) to pay all future rents to its agent, which plaintiff did. There was a restaurant on the first floor of the building, which restaurant was operated by another defendant, X. 2 One evening X's husband, who was operating the restaurant in X's absence, prior to closing it and leaving the building, lit the gas heater under the hot water urn (which then contained about six gallons of water). The burner was left on a low flame so that the water might be hot upon his return

10 Id. at 873-874.
11 Id. at 875.
12 See Blum and Dunham, Slumlordism as a Tort—A Dissenting View, 66 Mich. L. Rev. 451 (1968).

2 In this article, we shall not be concerned with the liability of X.
§5.4 PROPERTY AND CONVEYANCING

the following morning. Approximately three-quarters of an hour later, a fire and explosion took place in which the plaintiff suffered personal injuries and property damage. The plaintiff appealed to the Supreme Judicial Court on exceptions to the allowance of the defendant's motion for a directed verdict and also to the exclusion of certain evidence which the plaintiff had offered.

The plaintiff argued that the defendant could be held for its negligence on the ground of responsibility for a fire hazard in an area (not part of the common premises) within its control. The plaintiff contended that the building code had been violated in that there were no sprinklers in the building and that the premises were occupied by a restaurant using gas cooking facilities, a use specifically forbidden following a hearing by the board of appeal. The Boston Building Code §1008(a) provides: "Automatic sprinklers shall be installed in . . . buildings of Type I and Type II construction more than six stories high, and in other buildings more than three stories high." The defendant's building was Type IV and was six stories high. The board of appeal had previously granted the owner's request that the building be exempted from §1008(a) provided that the use of the first floor restaurant be terminated.

The Court sustained the plaintiff's exceptions relative to this defendant. The Court held that, subject to proof of other elements of liability such as causal connection, the violation of the building code may be found to be evidence of negligence, i.e., failure to use due care to keep the building in a reasonably safe condition. The Court differentiated some of the prior inconsistent cases on the basis that they dealt with unsafe conditions in common areas, as distinguished from unsafe conditions in other areas under the defendant's control. The distinction is predicated upon the anachronistic Massachusetts common areas rule that the landlord must use reasonable care to keep such areas in as good a condition as they were, or appeared to be, at the time the tenancy began. Since the pivotal process in resolving liability in a case involving a common area involves a comparison of the conditions existent at the time of letting with those prevailing at the time of the accident, the violation of the building code would not cast any relevant light as to whether a change in conditions had occurred.

§5.4. The anachronistic common areas rule. The regressive aspect of Dolan is its retention of the restrictive common areas rule and its resulting conceptualistic inability to hold that violation of the building code is evidence of negligence for injuries resulting from unsafe conditions in common areas. A preferable approach to the problem would be to adopt the rule that obtains in most other states, imposing a duty of reasonable care on the landlord without regard.

---

to the condition of the common area at the time the lease was entered into. In the past, bills have been introduced in the legislature to bring Massachusetts into line with the weight of authority. Legislative inaction in this area should not prevent the Court from correcting this error on its own initiative. When it comes to drawing the line which limits the proper function of a court, legislative acquiescence in a judicial rule does not, however, have anything like the same significance as the legislative creation of a new rule. Such acquiescence should, of course, be considered by the court, but its weight should be assessed in light of the real nature of the legislative process. In addition, it has been suggested that:

In the day of the Social Welfare state, the preoccupied legislature has neither the time nor the resources to re-examine all judge-made immunity rules. The legislature has more to do besides raking through the leaves of the state reports to discover which retrograde rules should be incinerated. The fact is that a legislature expresses itself by enacting and not by keeping silent. It is therefore a gross misstatement to say that legislature inaction reflects satisfaction with negative rules. It may with higher plausibility reflect satisfaction with the fluidity of the judicial process to re-examine and excise unjust rules and in the efficacy of overruling decisions.

The Massachusetts rule leads to tragic and inequitable results. In *Campbell v. Romanos*, an accumulation of rubbish in a common passageway caused an intense fire, resulting in the death of one of the tenant's children in the tenant's apartment. The Court ordered a new trial on the ground that the trial judge committed reversible error in merely charging the jury that the landlord had a duty to exercise reasonable care (without adding the qualification relating to the condition of the premises at the time of the letting). The soundness of applying the Massachusetts common passageway rule is suspect in any case, but even graver doubts are raised when the injury is inflicted not in the passageway, but in the tenant's own apartment. Furthermore, it is difficult to reconcile the approach taken in *Campbell* with that taken in *Regan v. Nelson*, in which a delivery area in back of a store was held not to be a common passageway.

The inequity of the Massachusetts rule is further illustrated by a series of cases dealing with the termination of tenancies at will. In *Stedfast v. Rebon Realty Co., Inc.*, the Supreme Judicial Court held

§5.4. 1 See 25 A.L.R.2d 364; 97 A.L.R.2d 220; 2 Harper and James, Torts §27.17 (1956).


4 See 30 NACCA L.J. 29 (1964).


that an existing tenancy at will was terminated by a conveyance of the leased premises to a corporation dominated by the landlord, and that the receipt of rent after the conveyance to the corporation resulted in the creation of a new tenancy at will between the tenant and the corporation. This new tenancy (which may be created even though the tenant has no notice of the conveyance to the corporation) is governed by a different tort standard than the old tenancy; the obligation of the corporate landlord is to use reasonable care to maintain the common passageways within its control in as good a condition as they were, or appeared to be, at the time of the creation of the new tenancy. Although the landlord's conveyance of his realty to a corporation dominated by the landlord may be motivated by business and estate planning considerations and may not have been viewed primarily as an attempt to reduce the landlord's tort obligations, one still cannot lose sight of the adverse and detrimental effect that the Steedfast rule has on injured tenants. The basic inequities of the Steedfast rule were once again demonstrated when the doctrine was applied in Auld v. Jordan.8

In Auld, the plaintiff tenant was injured by a fall in a common passageway. The plaintiff originally became a tenant in the building in 1943, when the premises were owned by the defendant, Jordan, as trustee under a will. Upon the death of the life beneficiary of the trust, Jordan became owner of the building in his own right and thereafter conveyed the premises to himself and his wife. On July 24, 1956, he and his wife conveyed the premises to W. E. Jordan & Sons, Inc., a Massachusetts corporation. The Court, applying the Steedfast rule, held that the trial judge had correctly directed a verdict for Jordan since he, in his individual capacity, was no longer the landlord. Furthermore, the Court indicated that suit against the corporation would also prove to be futile, since, under Steedfast, the corporation had only a duty to use reasonable care to maintain the area in as good a condition as the premises were, or appeared to be, at the time of the first receipt of rent by the corporate landlord. The Court reached this conclusion in the face of the evidence introduced that the plaintiff tenant was not notified of any of the transfers, and the testimony of Jordan that he always "considered himself the landlord and intended to be the landlord" and that he "never made any representation to the plaintiff that he was not the landlord." Furthermore, all rent receipts were signed at all times in Jordan's name.

It would appear to this writer that, upon these facts, a decision for the landlord is unwarranted. A holding for the tenant who has placed his reliance upon the continuance of the old tenancy (and who has relied upon representations made by Jordan) can be justified upon principles akin and analogous to estoppel. Furthermore, in another case decided two months after Auld v. Jordan,9 the Court

intimated that the *Stedfast* rule would not be applied when a tenant holds over after the termination of a lease. In *Cairns*, the Court, concluded that the parties impliedly agreed to a tenancy on the same terms and conditions as those of the prior tenancy.10 Is it thus not anomalous to hold that one party may unilaterally alter the rules governing the relationship in the fact situation present in *Auld*? If the *Stedfast* rule is to retain any popular vitality, it should be limited to the situation in which the tenant has received notice of the transfer. Since the landlord has retained legal counsel to organize the corporation and to effect the transfer, the requirement of notice would not appear to be an onerous burden.

§5.5. *Survey of effect of violation of statute.* There apparently is a conflict in the decisions as to whether a breach of a statute which requires a landlord to keep a building in repair, but which is silent as to civil liability, has the effect on tort liability of being either evidence of negligence or negligence per se.1 In some states the statute specifically imposes liability on the owner of the building for damages resulting from a violation of the statute.2 In some jurisdictions statutes provide that if the landlord fails to make necessary repairs, the tenant may make the repairs himself and deduct the expenditure from the rental payment. Under such a statute, some decisions have held that the statutory remedy is exclusive and that the violation of the statute has no effect on the civil cause of action for damages.3 There are decisions in a number of jurisdictions holding that civil liability attaches only where the landlord had actual or constructive notice of the defect.4 There has been considerable litigation as to whether the owner may escape liability by surrendering possession and control of the premises to another.5

### B. STUDENT COMMENT

§5.6. Occupiers' liability: Classification of entrants on land: Burns v. Turner Construction Co.1 After attending a medical lecture given by Dr. Mary Efron at the Boston Lying-In Hospital, plaintiff, a physician, sought out Dr. Efron at her office in the nearby Children's


§5.5 1 See 17 A.L.R.2d 704; 2 Powell, Real Property §234[2][c] (1967).


3 See, e.g., Dier v. Mueller, 53 Mont. 288, 163 P. 466 (1917).

4 See, e.g., Fogarty v. M. J. Beuchler & Son, Inc., 124 Conn. 925, 199 A. 550 (1938). But a landlord notified of a particular defect may well be held to have constructive notice of such other defects as would be disclosed by an ordinary inspection of the part of the premises complained of. See, e.g., Coleman v. Davis, 59 Ga. App. 750, 2 S.E.2d 148 (1939).

5 See 17 A.L.R.2d 704, 750, collecting cases.

§5.6 1 402 F.2d 832 (1st Cir. 1968).
Hospital (Children's). While at Children's and in the company of Dr. Efron and another physician, plaintiff had occasion to visit the I. C. Smith Building, one of the structures in the Children's complex. Upon leaving the Smith Building, the purpose of the visit to which is not disclosed, plaintiff and the other doctors stepped onto a newly constructed outside platform in an area which was still in defendant's possession in connection with its contract with Children's to remodel the Smith Building. While descending a staircase at the end of the platform, plaintiff touched against an unbolted railing. This railing, installed by a subcontractor of defendant, gave way, and plaintiff fell some six feet to the ground, suffering severe injury.

Plaintiff brought a diversity action in tort in the United States District Court for the District of Massachusetts. The court directed a verdict for defendant at the conclusion of plaintiff's case. On appeal, the First Circuit Court of Appeals HELD: Under the governing Massachusetts law, plaintiff, having alleged only ordinary negligence, could recover only if defendant had owed him a duty of care; and that plaintiff, because of the fact he could not lay claim to the status of a "business invitee" at the Smith Building, could not establish that any such duty was owing to him from the defendant. Because plaintiff's visit brought Children's no "benefit in a business or commercial sense," plaintiff was, as a matter of law, a mere "licensee."

Traditionally, as the Burns court suggested and as will be developed more fully within the text of this comment, Massachusetts has followed the restrictive categorization of entrants on land first formulated by the English courts in the 19th century, adopting also the harsh rules relating to negligence liability of land occupiers which accompany each category. The categories, familiar to every person associated with the practice of law, are invitee, licensee and trespasser.

The duties owed to an invitee by the occupier are to maintain his premises in a reasonably safe condition for the use of his visitor(s). As to whatever defects may exist which the occupier is unable to cure reasonably, but of which he is aware and reasonably certain that his visitor will not discover and avoid, he has a duty to warn.

The distinction between licensee and trespasser seems purely a

---

2 The court points out that plaintiff was not allowed to testify as to his reasons for having gone to the Smith Building. Id. at 333. Although the court intimates that it may have been error to have excluded such testimony—presumably because of its undoubted relevance to the issue of whether or not Children's might have anticipated a benefit by plaintiff's visit such as to vest him with the status of a "business invitee"—the court states that the correctness of such an exclusion was not in issue before it on appeal. Id. at 335.

3 It was not disputed in the case that the defendant would be properly liable for any negligence of its subcontractor. Id. at 332 n.3.

4 The phrase "occupiers' liability" is used in lieu of "owners' liability" since "[f]he important thing in the law of torts is the possession" and not the ownership. See 2 Restatement of Torts Second §328E and Comment a at 170-171.

metaphysical one in the Commonwealth, for while the licensee has a theoretically greater right to be on the land, having perhaps some form of private invitation or at least the tacit acquiescence of the occupier, the duty owed to both him and the trespasser, who has, by definition, no such acquiescence or permission, is the same. As to both, the land occupier must avoid only willful, wanton or reckless conduct in maintaining his premises or performing activities on them.6

It must be noted at this point that although the law of land occupiers' liability comprehends many more classes of issues than that of liability in negligence for maintaining defective premises, the scope of this comment will be limited solely to a consideration of Massachusetts' law within this relatively narrow area. A conclusion will be suggested that the courts should discard the present judicial policy of classifying plaintiffs entering or remaining on land as either invitees, licensees or trespassers, with the differing duties of the occupier attaching to each classification. In lieu of the process of classification, this comment will urge that the courts should substitute the classic reasonable care under the circumstances test in order to promote a more sensitive and judicious resolution of conflicts arising out of land-based relationships between litigating parties. Although it seems probable that the conclusion advanced in this comment may be valid also when applied to the Massachusetts courts' rationale for imposing or denying liability in related areas of the law — such as, for example, the host-guest relationship in automobile law7 — the implications to other areas will not be developed.

In England, from which the fundamental tripartite division of visitors on land into invitee, licensee and trespasser derives historically, the sanctity traditionally afforded the rights of the landowner to enjoy sole use and possession of his properties — a function of both the political dominance of the landed gentry and the inordinately high value of real property in the English economy prior to the dislocations of the Industrial Revolution — dictated a strong judicial policy of protection of those rights against the claims of intruders. In the words of Professor Prosser,

The true explanation [of the occupier's immunity from negligence liability] seems to be merely that, in a civilization based on private ownership, it is considered a socially desirable policy to allow a man to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right.8

It would seem natural to assume that the progress of the law in prescribing exceptions to the prevailing rule of non-liability should

7 This is, inter alia, the conclusion reached by the commentator in 1968 Ann. Surv. Mass. Law §5.17.

Published by Digital Commons @ Boston College Law School, 1969
evolve from the point at which the equities of the plaintiff, when put in balance against the rights of the occupier, would weigh most heavily, or, to formulate the proposition somewhat differently, where the effect of conceptualizing the plaintiff as an intruder would be most distasteful to reason. This, in turn, would seem to be a fact situation in which the plaintiff has given value to the occupier for the privilege of entry. Such is in fact the case, for the first modern decision imposing liability, *Parnaby v. Lancaster Canal Co.*,⁹ did so on the basis that the defendants, in operating a canal for profit, owed users a duty of reasonable care to insure that they could navigate it without fear for their lives or property. This quasi-contractual aspect of negligence liability was further refined through a series of cases¹⁰ which underscored the importance of the business relationship between the parties until, in the leading case of *Indermaur v. Dames*,¹¹ the essential distinction between the categories of business invitee and licensee was clearly defined to be that of a mutuality of business interest as contrasted with a mere permission to enter, mere permission being insufficient to entail liability for the occupier’s ordinary negligence even if the permission were grounded upon an affirmative invitation by the occupier.

Closely paralleling the emphasis placed by the courts upon a mutuality of business interest, and somewhat interwoven with that standard in the language of the early cases, is the notion of liability predicated upon an implied public invitation to enter the premises. Such an implied invitation was said to induce a justifiable reliance on the part of the plaintiff to presume — and a concomitant duty of the occupier to insure by the exercise of reasonable care — the safety of the premises. It is perhaps unfortunate for the development of the American law in the area of occupiers’ liability that this essential aspect of the early cases was not recognized and incorporated by the drafters into the first Restatement of Torts in 1934, where, in Section 332, a business visitor was narrowly defined as “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.”¹² Scholarly acceptance of the ground of liability reflective of the implied public invitation test evolved largely through the energies of Professor Prosser¹³ and has culminated with the adoption of that test in the Restatement of Torts Second as an alternative basis for negligence liability of the possessor of land. Section 332 now provides:

---

⁹ 11 Ad. & El. 223 (1839).
¹⁰ For a thorough tracing of the development of the law of classification in the early cases, see Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942); see also Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers, 69 L.Q. Rev. 182 (1953).
¹¹ L.R. 1 C.P. 274, 35 L.J.C.P. 184 (1866), aff’d, L.R. a C.P. 311, 36 L.J.C.P. 181 (1867).
¹² 2 Restatement of Torts §332.
¹³ Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1942).
(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. . . . 14

One cannot help speculating, in the light of the recent movement in the courts toward a deep questioning of the concept of classification, that an earlier affirmation in the Restatement of the implied public invitation test might have given such momentum to efforts to eradicate the distinctions in judicial construction of the word "invitation" that the movement toward full abolition of the different categories could be an accomplished fact. Clearly, the concept of an implied public invitation is only a backhanded synonym for "foreseeability" as that concept relates to the process of defining negligence under the traditional "reasonable care under the circumstances" formulation; and it is entirely possible, given the prestige that the Restatement enjoys in the torts area in the eyes of the courts, that the early inclusion of implied public invitation as a sufficient basis for liability in the Restatement could have provided the appropriate vehicle for a leap from classification to traditional negligence equation terminology.

Notably, the early American cases, drawing heavily on the English precedent, often went off on the basis of an implied public invitation where there was absolutely no hint of an economic benefit involved in the relationship between the parties. Among the earliest was the leading case of Sweeney v. Old Colony & Newport R.R.,15 where the plaintiff, in reliance on a signal by defendant's flagman, was run down while attempting to ride over a planked crossing constructed by defendant and used continuously by the public. Rejecting the defendant's contention that the plaintiff was a licensee using the facility at his peril, the Court stated,

The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon.16

Another important Massachusetts case decided 25 years later and often cited in support of the sufficiency of an implied public invitation to establish liability is Davis v. Central Congregational Society of Jamaica Plain.17 The plaintiff, injured when she fell over a wall running along a negligently maintained path leading to the church to which she

14 2 Restatement of Torts Second §332.
17 129 Mass. 367 (1880).
went to attend a conference as a visitor, was held to be entitled to compensation from the defendant religious society. Liability attached in spite of the fact that the conference was not held by the defendant Society itself, but rather by a separate association of which the defendant was only a member, and the fact that no pecuniary or other benefit was either expected or received by the society. Citing Sweeney, the Court found that "[t]he fact that the plaintiff comes by [implied public] invitation is enough to impose on the defendant the duty which lies at the foundation of this liability. . . ."\(^{18}\)

Paradoxically, the economic benefit test, the one afforded exclusive recognition by the first Restatement, was actually the later of the two tests to be applied in Massachusetts.\(^{19}\) In the case of *Plummer v. Dill*,\(^{20}\) the Court held that a woman injured by striking her head on a protruding sign near the landing of the defendant's building could not recover because, "[s]he did not go there to transact with any occupant of the building any kind of business in which [defendant] was engaged, or in the transaction of which the building was used or designed to be used."\(^{21}\) The *Plummer* case is significant also because it represents the first clear differentiation between the concepts of public and private invitation as conclusive on the status of the plaintiff and the correlative duty owed by the occupier. Distinguishing the case at bar from such precedent as the *Sweeney* and *Davis* decisions, the court stated,

The inducement, or implied invitation, in these cases [*Sweeney and Davis*], is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be coextensive with the inducement or implied invitation.\(^{22}\)

It is fair to state that the character of Massachusetts law has remained unchanged in any of its essential features since the classifications and duties became determinants of the standards of liability set up in these early cases. All issues raised by subsequent fact situations have been considered from within the same conceptual framework.\(^{23}\)

\(^{18}\) Id. at 372. See also Fortier v. Hibernian Bldg. Assn., 315 Mass. 446, 53 N.E.2d 110 (1944) which supports Davis by holding that the owners of a building who let rooms for public functions were inviters not only as to hirers of the hall but also as to the hirer's patrons. But see Comeau v. Comeau 285 Mass. 578, 582, 189 N.E. 588, 590 (1934).

\(^{19}\) For discussion of the origin of the economic benefit theory and its early judicial acceptance in Massachusetts, see Prosser, The Law of Torts §58, at 396 n.73.

\(^{20}\) 156 Mass. 426, 31 N.E. 129 (1892).

\(^{21}\) Ibid.

\(^{22}\) Id. at 430, 31 N.E. at 150.

\(^{23}\) Professors Gilmore and Axelrod's language, while directed to categories of secured commercial transactions is equally forceful when applied to the classification.

http://lawdigitalcommons.bc.edu/asml/vol1969/iss1/8 14
As typified by *Burns*, virtually all cases which reach the appellate courts in occupiers' liability suits do so procedurally from the plaintiff's appeal of a directed verdict for the defendant at the conclusion of the plaintiff's case. Verdicts are directed either because the court finds as a matter of law that the plaintiff, having alleged only ordinary negligence, cannot recover because there is no evidence sufficient to support a finding that the plaintiff was an invitee; or because the plaintiff, alleging gross negligence or the presence of willful, wanton or reckless conduct, has presented no evidence to support those allegations. Usually, of course, ordinary negligence is the only negligence present under the facts, and thus the plaintiff's case stands or falls on the question of the plaintiff's status on the land at the time of injury. This question, as will be shown, is one that courts are loathe to let reach a jury, and one which is inordinately often decided in favor of the defendant. On appeal, the appellate courts purport to reach a conclusion on the question of liability de novo, utilizing basically the following procedure of analysis: After an initial finding of evidence in the case sufficient to support an allegation of negligence in defendant's constructing and/or maintaining the premises, the court will inquire into whether or not the defendant owed a duty of ordinary care to the plaintiff. The answer to this question rests upon the result of an initial determination of the status of the plaintiff as invitee, licensee or trespasser. This determination in turn depends upon findings on the questions of (1) whether there was an invitation in the case, (2) whether that invitation, if present, was public or private in nature, and (3) if private, whether or not it was issued in the expectation of an economic benefit. If no private invitation was in fact extended, or else not extended in expectation of an economic benefit, the question becomes whether or not such an invitation may be implied in law because the entrance of the plaintiff did ultimately result in an economic benefit to the defendant.

Illustrative of judicial application of these tests are such recent Massachusetts decisions as those of *Conklin v. Boston Housing Authority*\(^\text{24}\) and *O'Brien v. Myers*.\(^\text{25}\)

In *Conklin*, plaintiff's claim for an injury suffered in a fall into a hole on a blacktop surface within the premises of defendant's housing project was defeated on the basis that plaintiff, although a tenant in one of the buildings comprising the project, was a mere licensee as to the areas surrounding the other buildings. Specifically, the court reiterated the familiar grounds that an invitation may not be implied from mere tacit assent or acquiescence, that a failure to prohibit use of visitors on land: "[L]egal categories are categories of devices. Their manifest inadequacy may be traced to the lawyer's predilection for looking on the disorderly, accidental and confused result of historical development as a necessary order: the cramping grip of the dead hand has . . . notably restricted the free play of legal imagination." Gilmore and Axelrod, Chattel Security 1: 57 Yale L.J. 517, 519 (1948).


of the premises tantamount to permission was not an invitation to use them, and that absent an invitation, plaintiff was, at best, a bare licensee entitled only to protection from gross negligence, of which there was no allegation in the case. 28

The O'Brien case is an archetype of the social guest decision. In such cases the facts usually leave no doubt of an invitation, as here, where the plaintiff fell on a scatter rug in her sister's home. Of course, as the invitation is private, these cases turn on the question of whether a pecuniary benefit to the occupier, per se or by implication, is an element of the circumstances. The O'Brien court, in holding plaintiff to be a social guest, concluded:

Such benefit as the plaintiff was conferring on her sister was that of "a member of a family . . . rendering friendly help in household routine" and was not of "the character [to] make it clearly the dominant aspect of the relationship." 27

If a public invitation is found or a private invitation accompanied by the requisite economic benefit, as in, for example, the usual shopkeeper-customer relationship, one further question must be answered in the affirmative before liability will attach for the occupier's negligence: Was the plaintiff within the area of invitation when the injury occurred? In one often-cited case, MacGillivray v. First National Stores, Inc., 28 the plaintiff, after having been expressly directed to a back room in defendant's store by its agent for the purpose of leaving her coat prior to shopping, entered the room and fell through a hole in the floor. The Court held that the duty of maintaining the premises in a reasonably safe condition for the plaintiff's use extended only to such parts of the premises as were open or appeared to be open for the use of customers. Because there was no evidence that the back room was used for the display of goods incident to sale, there could be no recovery, since the permission given by the shop clerk was an invitation for the plaintiff to use the back room only for her own accommodation and not for purposes of business.

A study of these decisions is not far underway before it becomes obvious that the process of classification cannot be responsive to the infinite variety of fact situations which give rise to the need to apply it. Too many artificial distinctions are made by the courts which are repugnant to common sense.

Two cases may serve as illustrations. In Zaia v. "Italia" Societa Anonima di Navigazione, 29 the plaintiff was allowed to board defendant's vessel to take leave of a departing passenger. On her return from

29 524 Mass. 547, 87 N.E.2d 183 (1949). See also Brosnan v. Koufman, 294 Mass. 495, 2 N.E.2d 441 (1936) (no implied public invitation to mail letter in defendant's building, notwithstanding universal custom and United States statute requiring mailboxes to be placed only in "public places").
the ship, she tripped on a loose strip of brass, fell and was injured. Distinguishing the situation from precedent dealing with visitors of railroad passengers, in which the implied public invitation basis for recovery was held applicable, the Court found no analogous policy of steamship companies to welcome visitors of passengers before embarkation and held the plaintiff to be a licensee. Is it not completely safe to submit that anyone who has ever attended a bon voyage party aboard a ship would marvel at the court's ingenuousness? Today's visitors, the steamship companies know, are tomorrow's voyagers.

Perhaps even more questionable is the result in Donovan v. Vennik. Although it must be conceded that there was no error in classification, the Donovan case is rather demonstrative of the inordinate degree to which the occupier is protected in the private, non-business situation by the effects of classification. In Donovan, the injured plaintiff was an infant two years of age. The facts indicate that the defendant went to her garage to back out her car, seeing the plaintiff across the street and not in her yard, where he often played. Upon backing out, she ran over the plaintiff in her driveway. Hearing his cry, she went to the rear of her car, told this two-year-old boy to "lie still," returned to the car and drove it forward over him. The Court held no liability attached to her actions, although it is brought out in the opinion that a jury might have found that the injury for which the plaintiff sued occurred after defendant's initial discovery of the plaintiff beneath her wheels and on the subsequent forward motion of the car. Plaintiff was a mere licensee, on defendant's land with mere tacit acquiescence, and the conduct of the defendant could not be said as a matter of law to rise to the level of willful, wanton or reckless.

While it is apparent that the overwhelming number of cases turning on the basis of classification can be justified as having been correctly decided given all relevant facts, it is clear that the correctness of the decision is never a function of the classification per se, but rather of the fortuitous fact that classification in the case reflects an approximation of the proper balance of a defendant-occupier's rights against his responsibilities under the circumstances. The problem with classification, of course, is that it makes the question of the plaintiff's status of primary importance in cases where the proper focus should be the circumstances surrounding his injury. In attempting to adjust the duty owed by the defendant to the duty properly expected by the plaintiff by arbitrarily categorizing the latter in one of three rigid

82 Thus in the case of Reardon v. Baker, 355 Mass. 754, 231 N.E.2d 548 (1967), plaintiff's counsel could argue that although his client, the nine-year-old son of the lessees of a portion of defendant's house, was a licensee or trespasser when sliding down the roof of defendant's shed, the injury was not suffered until after the boy had momentarily reached the ground, where he was an invitee. Although the court dismissed the argument, it obviously could not do so on theoretical grounds.
compartments, the courts lose the flexibility to deal with Donovan-like fact situations in which the fact that the plaintiff was a licensee is clearly of only minor importance, if not in fact irrelevant in reaching an objective determination of whether the plaintiff would be entitled to compensation for his injury. Criticism of classification, steadily increasing both among scholars and in the courts, does not proceed on the assumption that classification cannot deal effectively with black and white, but rather that it cannot deal as effectively with grey fact situations as another test already refined, available and pervasive throughout the law of negligence, one which quite properly replaces the concept of invitation with that of foreseeability — the reasonable care under the circumstances test. In the case of Kermarec v. Compagnie Generale Transatlantique,38 the United States Supreme Court, refusing to apply the common law rules of occupiers' liability to admiralty cases, stated:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common laws have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."34

As of this writing, one jurisdiction, California, has fully repudiated the common law of classification, holding, in the case of Rowland v. Christian,35 that the plaintiff, although a social guest, could recover for injuries suffered as a proximate result of the ordinary negligence of his hostess in failing to warn him of the defective condition of a bathroom water faucet handle which broke in his hands. The Rowland court stated:

We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee

34 Id. at 630-631.
or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative. 88

Other jurisdictions have recently shown a disposition to move in the direction of Rowland, 87 and it is to be expected that further liberalization will shortly be forthcoming in these and other courts; for once the rationale for classification is repudiated in one of the areas to which the process of classification extends, it is difficult both to see how it can be left intact in any other opposite area and to imagine that the truth implicit in the repudiation will not sooner or later capture the minds of the judges in new jurisdictions.

Arguments for the retention of the present framework of classification proceed along familiar lines. First, there are courts which quarrel with the premise that distinctions in status used to determine liability in occupier-entrant cases often preclude proper consideration of other relevant concerns under the facts. Their position is a variant of the contention that classification supplies "a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law." 88 The flaw in such an argument is of course a failure to recognize that the rationale for the result in a given case can be only so strong as is the logic in back of the classification itself. When the classification is forced, whatever justification a court might have had for deciding one way instead of another is vitiated, and the whole system of classification is necessarily called into question. 89 Also implicit in the "reasonable

88 The court reasoned further, "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty." Id. at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.


88 Rowland v. Christian, 69 Cal. 2d at 120, 443 P.2d at 596, 70 Cal. Rptr. at 105, Burke, J., dissenting. All arguments for abolishing classification are considered and rejected in Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955).

89 Consider, for example, how Professor Harper emphasizes the artificial choice of the plaintiff's status made by the court in the case of Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942), to finally call into question the entire concept
and workable approach" contention is the basic assumption that the
categories sculpted by the courts are reflective of valid social distinc-
tions which are relevant to a court's determination of whether a given
plaintiff deserves compensation more than his adversary needs protec-
tion from undue burdens on his use and possession. While this is
clearly the case with some types of licensees, it is clearly not the case
with others. It is submitted, for example, that members of an occu-
pier's Tuesday afternoon bridge club would expect and receive a
greater degree of preparation and inspection for their safety than
would the uninvited door-to-door vendor who sells that occupier his
product on Tuesday morning.40

The second argument from the bench, while not conceding the
inefficiency and injustice of a system of classification, impliedly recog-
nizes deficiencies, but asserts in circumspect language the contention
that classification is a lesser evil in practice than a case by case jury
determination "under the application of the basic law of negligence,
bereft of the guiding principles and precedent which the law attaches
by virtue of the relationship of the parties to one another."41 As the
court concluded in the case of Wolfson v. Chelist,42

... we believe the duties and liabilities in occupier-entrant cases
will be quite as justly if not more justly considered and with less
confusion determined by generally continuing the existing clas-
sification of relationships of occupiers-entrants, and by generally

of classification: "It is not easy, at first glance, to discover a 'business visitor' in an
old grad, wandering about University property at two o'clock in the morning to
find a place to urinate. It may be that in some vague and general way Yale hoped
to derive tangible or intangible benefits ... from the plaintiff's return to the
campus for his class reunion. But if this kind of economic interest is enough to turn
a gratuitous or 'bare' licensee into an invitee or business guest, the plaintiff's
presence and help around the house ... might be thought to bring about a similar
transformation. ...

"If the principle involved in these cases is the reasonable expectations of the
parties, in view of the relationship between them, why should not each case be
treated on its own merits without arbitrary judge-made rules based upon ephemeral
classifications such as are involved in the licensee-invitee dichotomy? The occupier
of premises should do what a reasonable person would do under the circumstances
for the safety of those he knows are on his premises and those whom he had reason
also James, Tort Liability of Occupiers of Land: Duties Owed to Licensees and
Invitees, 63 Yale L.J. 605 (1954).

40 "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 on the premises 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." McCleary, The Liability of a
Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev.
45, 58 (1936).

41 Burke, J., dissenting. Rowland v. Christian, 69 Cal. 2d at 120, 443 P.2d at 569,
70 Cal. Rptr. at 105.

42 284 S.W.2d 447 (Mo. 1955).
continuing the use of terminology long employed by the profession and by the courts in advising and determining what is right between occupier-entrant adversaries. . . .

Scratching the "confusion" feared by the court will reveal nothing less than a fundamental lack of trust that a jury will give appropriate deliberation to the plight of the occupier when its members are confronted with the often tragic presence of an injured plaintiff. The courts harbor a deep-rooted suspicion that strict liability will, in effect, be substituted for the fault principle. Illustrative of this syndrome is the admission of the court in an early English case in which the judge stated, after holding as a matter of law that there could be no recovery for injuries of an illiterate plaintiff who fell while on defendant's railroad as a result of confusing the signs on adjoining doors: "Every person who has any experience in courts of justice knows well that a case of this sort against a railway company could only be submitted to a jury with one result." Of the judge's apology, one noted commentator has written: "To say that no reasonable man could conceivably hold what in fact any jury would hold required a considerable degree of judicial courage." And again of the practice of the courts in general:

It was much easier to narrow the questions to be put to the jury by devising different legal categories of visitor towards whom different standards of conduct might be demanded of the occupier, and then merely to ask the jury whether the particular standard of conduct required had in fact been shown.

One response to this aspect of the pro-classification argument is to cite the simple fact that frequently in personal injury cases a defendant will insist on a jury where the plaintiff has waived the privilege. An even more persuasive rebuttal takes its roots in the constitutional origins and theory of American jurisprudence and is eloquently constructed by Graham Hughes:

"There is something distasteful in the view that tribunals cannot be afforded the best equipment for reaching sensible decisions because that equipment is likely to be abused. How long can a legal system survive when it goes in terror of one of its fundamental institutions? No amount of cautionary tales can

48 Id. at 452.
46 Id. at 150.
47 Ibid.
48 Notable also is the marked trend of American courts generally to trust the jury increasingly in other areas of personal injury actions. "Over the last half century there has been a great decrease in the proportion of directed verdicts. Issues are now commonly left to the jury which fifty years ago would have been decided for the defendant by the court." Prosser, The Law of Torts §58, at 572.
ultimately obscure the realization that we must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.49

Recent in-depth studies of the institution of the American civil jury have revealed that judicial distrust of the jury to come to a correct decision is largely without foundation in fact. Writing of the degree with which judges and sample juries coincided in their assessments of liability in hypothetical cases conducted as mock trials, Professor Kalven, architect of the University of Chicago jury project, recalls:

The experimental auto negligence case was given to a group of trial and appellate judges for decision. . . . The mean award of the judges was $32,500 as compared with the experimental jury average verdict for the same version of the case of $34,300 — a striking similarity.50

Professor Kalven concludes, "The very widely held view that juries in personal injury cases are more plaintiff-prone than judges is shown to be a considerable oversimplification."51

Moreover, it is important to note the fact that arguments predicated on a distrust of jury behavior tend to ignore the important procedural safeguard which the court has at its command in order to insure that, in its deliberation, the jury consider the proper issues. This safeguard is the right of instruction by the court.52 In addition to the usual negligence instructions as to causality, foreseeability and the like, further instructions may be framed by the court so that the jury may appreciate the peculiar problems of the occupier-entrant relationship. Such instructions would probably define due care under the facts as dependent upon such considerations as (1) the nature of the entry — expressly forbidden, tacitly permitted, expressly invited, etc.; (2) the purpose of the entry — theft, aid, business, etc.; (3) the condition of, or activities on, the premises; (4) the nature of the defect or danger causing injury — a trap, dangerous instrumentality, natural land formation, etc.; (5) the extent of knowledge and appreciation of the

51 24 Ins. Counsel J. at 380.
52 There are, of course, other traditional safeguards which a court may invoke in appropriate circumstances. Foremost among these would be the defendant's directed verdict, which a court would grant in circumstances where, for example, pursuant to the provisions of Acts of 1969, c. 761 (enacting the doctrine of comparative negligence as Massachusetts law), a court might conclude that no reasonable man could find the conduct of the occupier-defendant to be more negligent than that of the plaintiff-entrant.
defect or danger by the occupier or entrant; and (6) the cost of cure of the defect or danger to the occupant. It is difficult to see how the presentation of such instructions would not suffice to dispell objections emanating from the court on the grounds of possible “confusion” of the issues.

Not irrelevant to the question of liability, although perhaps not having a logical bearing on the question of negligence, is the availability and cost of insurance for protection of the occupier. One of the objections to the imposition of the reasonable care test, at least with respect to the social guest, has traditionally been that the guest, being usually of the same socioeconomic status as the host, is equally able to bear the cost of injury.58 Notwithstanding the fact that such an objection conveniently discards the concept of fault as the rationale for tort liability in the occupier-entrant case, the true question remains why the social policy of the law of torts should not continue to focus upon compensation of the plaintiff54 (as it has done increasingly in other areas of tort law) where the resultant burden upon the defendant is not prohibitive. In any event as the court noted in Rowland:

... there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier’s liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.55

It is submitted that there can be no excuse in the seventh decade of the 20th century for a perpetuation of such a crude and ineffective legal mechanism based upon unjustifiable social distinctions as is the process of classification. England, the birthplace of the three basic categories, has recently repudiated the doctrine by statute as it purports to differentiate between invitees and licensees, establishing the same “common duty of care” to all visitors.56 Unfortunately, possibilities for action in Massachusetts on the problems of classification are presently less than encouraging. There is, of course, in the Commonwealth no counterpart to the Law Reform Committee whose proposals became the backbone of the English legislation,57 and it is very unlikely that the Massachusetts legislature will see fit to enact such radical legislation on its own initiative. Such inertia, however, need not be

58 “The guest is in most or at least in many cases in approximately the same economic ‘bracket’ as his host, and so the guest is generally, although admittedly not always, as able as the host to bear the loss resulting from the ordinary imperfections and inadvertances in the premises. ...” Wolfson v. Chelist, 284 S.W.2d at 450.
55 Rowland v. Christian, 69 Cal. 2d at 118, 443 P.2d at 567-568, 70 Cal. Rptr. at 103-104.
56 The Occupiers’ Liability Act of 1957, 5 & 6 Eliz. 2, c. 31.
57 The Occupiers’ Liability Act is based upon the majority recommendations contained in the Third Report (Occupiers’ Liability to Invitees, Licensees and Trespassers) of the Law Reform Committee (under the chairmanship of Jenkins, L.J.), which was published in November 1954 (Cond. 9305).
§5.6 PROPERTY AND CONVEYANCING

conclusive on the chances for reform. The classification framework was fabricated by courts; it can be dismantled by courts as well, indeed as it has been partially in a number of jurisdictions and completely in California. Admittedly the Massachusetts judiciary has shown no disposition as yet to reinvestigate its doctrinal stance in the occupier-entrant area. There is, for example, absolutely no indication from the reports that the courts are even entertaining argument formulated upon such policy considerations as have been expounded here. Not a published word has been addressed to issues transcending the narrow question of the proper classification of a given plaintiff under the facts.58 While such a hostile environment confronting advocates of change is depressing, the present posture of the judiciary seems bereft of the logical justification it must possess to withstand ultimately the assaults which are most assuredly forthcoming in ever-increasing numbers. Nor need it necessarily be that hopes for judicial abolition of the classification doctrine must be directed to some remotely envisioned day in the future simply because no signs of change are now apparent. The jurisdiction of New Jersey, for example, shed a well-earned reputation for harshness in its treatment of the trespasser and became, by virtue of four related decisions spanning only six years,69 among the most progressive and critically responsive. In the words of one commentator, the New Jersey cases "stand as a peak of advancement in the progress of integrating duties to trespassers with a general theory of negligence."60 It would be the foolish advocate indeed who would forego an opportunity to press upon the courts the merits of the general negligence approach to his case, whatever his subjective evaluation of the odds of success. Much of the law of Massachusetts reflects the most sensitive and bold of judicial consciences. Largely, of course, the reluctance of Massachusetts courts to interfere with the classification structure emanates from a recognition of the dictates of a policy of stare decisis. The element of reliance as an essential aspect of a legal system has been afforded great respect in this Commonwealth, as it undoubtedly deserves.

What is needed then, in the last analysis, is a judicial procedure which at once secures the benefits of the classification doctrine to the

58 The last case decided by the Court in which the invitee, or gratuitous guest distinction was drawn is Gray v. Lauziere, 354 Mass. 683, 241 N.E.2d 825 (automobile guest). There is no discussion involving considerations other than the proper classification of plaintiff.


60 Hughes, Duties to Trespassers: A Comparative Survey and Revaluation, 68 Yale L.J. at 644.
citizens of the Commonwealth who have relied on the precedent developed in the case law and operates to change the law. There are two acceptable ways, among several possible ones, to effectuate this change without prejudice to vested reliance in the status quo. The first is the use of the prospective decision, in which the court announces that, although it feels constrained to follow the law in the case at bar, it will not thereafter be disposed to follow it. Such a disposition of the case has the dual advantage of protecting the defendant against surprise and putting potential defendants at large in the jurisdiction on notice in time for them to alter their circumstances to protect themselves. It has, however, the notable disadvantage of discouraging litigation by plaintiffs whose cases are beset by adverse precedent, thus prohibiting the continuing re-examination of judicial policies. No plaintiff will spend money to appeal a case he knows he cannot win on the humanitarian impulse that he might possibly aid someone similarly situated in the next session of the court.

The second method open to the court has no such disadvantage, but accomplishes the same end, and seems therefore the more desirable. Here the appellate court need only wait for a case in which the classification process plays a part but in which it need not be determinative of the issue of liability. The court may then decide the case according to the findings it deems controlling and then proceed to express its disinclination to follow the law of classification in the future. The area

61 Although no Massachusetts case has been found which utilizes the prospective decision, the constitutionality of state action limiting to prospective application a reversal of previously declared law has been sanctioned by the United States Supreme Court in Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 558 (1932) (statutory construction). In Great Northern, Justice Cardozo said for the Court that a state "may make a choice for itself between the principle of forward operation [prospectivity] and that of relation backward [retrospectivity]." 287 U.S. at 564. The constitutionality of the prospective decision has been recently reaffirmed by the Court in Linkletter v. Walker, 381 U.S. 618 (1965).

62 Other arguments against the employment of the device of the prospective decision include the Blackstonian concept that judicial decisions are merely the "discovery" of law which has always existed, an adherence to which would bar prospectivity on theoretical grounds as a technique reserved to the legislature whose function clearly includes power to enact law with prospective application and, as applied to the federal judiciary, the notion that the "Case or Controversy" requirement of Article III of the Constitution forbids declaration of what the law will be in the future. See generally Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962).

63 This method of decision is typified by the leading tax case of James v. United States, 366 U.S. 215 (1961), in which the Supreme Court overturned James' conviction for "willful" failure to pay income tax on funds he had embezzled on the grounds that a prior holding in Commissioner v. Willcox, 327 U.S. 404 (1946) (embezzled funds do not give rise to taxable income), negated the possibility that James could have had the requisite evil intent to "willfully" evade taxation. In reversing on these grounds, the Court strongly implied — with no explicit mention — that James would have prospective effect only and that Willcox should control, at least with respect to criminal prosecution, on the question of the legality of taxpayer conduct until the date of the James decision.
§5.7  PROPERTY AND CONVEYANCING

of occupiers' liability is well-litigated, and an appropriate choice of cases should present little problem to the court.

In conclusion, while prospects for immediate reform of the well-entrenched categories of classification seem remote, both the clear need for such reform and the presence of available procedures to effect it without undue disturbance of vested interests seem destined to put pressure on the courts of the Commonwealth to speak meaningfully to the issues raised by advocates of substitution of the general negligence approach for the present system of classification. Such a pronouncement is certain to some soon; it is hoped that a measure of responsive action will be therewithin.

ERNEST B. MURPHY

§5.7. Summary process for possession of land: General Laws, c. 239.1 Chapter 239 of the General Laws of Massachusetts provides a remedy for the recovery of possession of land by summary process. The remedy is entirely statutory and is limited to eight categories of persons who may bring the action.2 These parties are persons deprived of the enjoyment of land or premises by a forcible entry; persons forcibly kept out of possession by one who entered the premises peaceably; lessors whose tenants hold over without right after the termination of the lease; the purchaser of premises under a foreclosure sale; the person entitled to premises under a tax title foreclosure; the purchaser of land where the seller refuses to vacate the premises; the seller of land where the purchaser has gone into possession but fails to take title; and the party in whose favor a decree of confirmation of title has been entered, except where the person actually in possession of the premises to be recovered, or person under whom he claims, has erected buildings or improvements on the land, and the land has actually been held by him or those under whom he claims, for the six previous years under what that person thought was a good title.3 Each of the categories involves situations where the issue is the right to possession of the land or premises.4 If the issue between the litigants is a question of who has better title, then the traditional common law action to try title must be used.5 Under Chapter 239, a court merely seeks to ascertain whether a previous right to possession

1 The historical survey in the second section of this Comment, where specific references are not included, is drawn from the following basic general works on property law and early English history, hereinafter cited by name of author: Casner and Leach, Cases and Text on Property (2d ed. 1969); C. J. Moynihan, Introduction to the Law of Real Property (1962); T. Plucknett, A Concise History of the Common Law (5th ed. 1956); A. Simpson, An Introduction to the History of the Land Law (1961); 3 D. Stenton, English Society in the Early Middle Ages (1066-1307) (1964); H. T. Tiffany, Property (5d ed. 1939).
2 G.L. c. 239, §§1-11.
3 G.L., c. 239, §1.
has terminated and whether the claimant is entitled to present possession. For example, whether or not a lessor has valid title, he has the right to possession as against the lessee when the lease terminates. Similarly, a purchaser of the land, as successor to the lessor’s interest, may recover possession when the lessee’s rights under a lease terminate. Any party forcibly ousting a landowner or physically preventing him from reentering his land after the termination of a lease or license is, of course, without possessory right as against the owner.

The summary process remedy was enacted to mitigate the harshness of the older common law remedies for recovering property. Those remedies required that the entire question of title be determined before possession would be granted. Title litigation was quite lengthy and, during the proceedings the party who was allegedly in illegal possession, remained in possession of the land or premises. Chapter 239 enables recovery of premises without title litigation where the right to possession is determinable and witnessed by a lease or contract of sale, or by forcible ouster.

The relief granted to landowners was substantial. In particular, eviction of tenants by landlords was facilitated. Summary process has thus become an important and frequent legal tool of the landlord. The landlord merely goes to the district court or superior court in his jurisdiction and obtains a summons. The summons directs the tenant to answer to the complaint that he holds the premises in question against the right of the landlord. The action will be heard without a jury in the court from which the summons issued.

If the landlord wins his case, he receives a writ of possession, which directs an appropriate enforcement officer to evict the holdover tenant. The officer may store any goods of the tenant if the latter does not claim them, and the warehouse will have a lien on the goods for payment of storage costs. The landlord himself will be reimbursed by the tenant for court costs and for any rent due up to the date of eviction. Should the tenant prevail by showing that the lease has not been terminated, or that the landlord did not meet the notice requirements of Chapter 186 for terminating tenancies, he will be compensated by the landlord for court costs. The tenant may interpose an equitable defense based upon wrongful action if the landlord sought the summary process for fraudulent or malicious motives.

---

8 Ibid.
9 G.L., c. 239, §2.
10 King v. Dickerman, 77 Mass. 480 (1858).
11 G.L., c. 239, §4; Treasurer v. Tremont Storage Warehouse, 296 Mass. 531, 6 N.E.2d 888 (1937).
13 G.L., c. 239, §8.
§5.7 PROPERTY AND CONVEYANCING

A summary process statute may result in certain hardships on tenants. Appeals by the tenant from a judgment of the court in a summary process proceeding are actively discouraged by the statute. A bond must be filed with the court in a sum determined by the court to insure payment by the tenant of rent accruing and all other expenses which may be imposed on the landlord by the prolonging of the litigation. The requirement of the bond may now, however, be waived if a tenant is financially unable to pay. In addition, in certain hardship cases the statute allows for a stay of proceedings; furthermore, certain housing code violations by the landlord may bar the use of the summary process. These elements of the remedy, which may operate to help and hinder the tenant, are the most controversial. They must be considered in greater depth. Most of them are of recent enactment, being either totally new or amended parts of older provisions. However, an analysis is best left until after an examination of the history of the statute and its antecedents.

Chapter 239 has its roots in the common law of England as it evolved within the political and social system established by William the Conqueror and his successors. Property and property interests played an important role, and property law was one of the earliest branches of the common law. In the property law of Norman England there was no absolute ownership of land by private individuals. All land was held in grant from the king. The party holding land under a grant received not the land itself but rights over the land. In return, he rendered services to the king in the form of provision of knights and fighting men or such other services as the king deemed necessary. In this way William the Conqueror rewarded his chief supporters by providing them with a source of wealth and production and guaranteed their loyalty by making the grant conditional upon service. He thereby assured himself of an adequate army and rudimentary state administration. When the party, known as the tenant, received the land of the king, he paid homage, demonstrating that the nature of his holding was as a grant or tenure, from the king. Usually accompanying the act of homage was an oath of fealty, embodying the promise to faithfully render the services owed and the promise of loyalty to the king as lord. To fail to perform the services due or to act disloyally in some other way was to commit a crime against the king. Such a breach of the oath of fealty was known as felony. This is the origin of the modern day term felony, which has evolved to include all serious crimes against the state. The commission of a felony

17 G.L., c. 239, §§9, 10.
18 Id. at §8A.
19 See note 1 supra.
20 Simpson at 5-6; Stenton at 57-58.
21 Simpson at 15-19; and see Black's Law Dictionary 739, 865 (4th ed. 1968).
22 Simpson at 15-19.
by a tenant resulted in the forfeiture of the land back to the king. This was known as escheat propter delictum tenentis (forfeiture due to the crime or felony of the tenant).  

The picture presented by this brief outline of early feudal tenure is simplistic. Social and political institutions rarely achieve complete uniformity or perfection. The oversimplification does serve, however, to underline the role that tenancies in land held in the early feudal economic and social organization. Norman England depended on agriculture for its basic wealth. The mass of the people lived in close reliance on the land. By granting portions of the land to his supporters as tenants, William not only assured their loyalty and bound them in service, but he also gave these tenants the wherewithal to support both themselves and the men they furnished to the king. In addition, the king gave these tenants administrative power over the agricultural and local populations residing on the land. William thus assured some decentralization and localization in the handling of domestic affairs while binding the local regions to him in the fealty owned by the tenants. It rapidly became the habit of the tenants of the king to grant tenancies of parts of their holdings; thus, a pyramid of lesser tenancies was formed. This process of pyramidization was known as subinfeudation and the immediate tenants of the king became known as tenants in capite, or tenants-in-chief, to distinguish them from the mesne or intermediate tenants below. Each tenant became the lord of a tenant holding from him, and so on down the pyramid. At the bottom was the mass of the population who formed the basis of the agricultural working class.

A society that so carefully structured land holding and the conveyancing of land had to be particularly concerned with preservation of the stability of the structure. A frequent problem of the feudal age everywhere in Europe was the lawlessness of much of everyday life. In England, in particular, it was common for more powerful lords to forcibly oust their weaker landholding compatriots. Such ouster from the possession of land was known as disseisin. In dealing with disseisin and the threat it posed to the stability of the tenurial system, the kings of England had two basic alternatives. They could criminally punish the disseising lord and his retinue and restore the unfortunate victim to his possession. However, such a sanction required that the king be able to muster enough force and authority to impose it effectively, something which could not always be done. Many of the tenants-in-chief had grown very wealthy, very powerful, and very independent on their grants. If the king could not punish the disseisor, he could at least require that the disseisor strictly fulfill the services and dues owing from the land forcibly taken. The bonds of fealty and homage were a sufficiently strong moral force to compel the dis-

28 Id. at 19.
§5.7

PROPERTY AND CONVEYANCING

seisor to fulfill the feudal incidents. It was also a small price to pay for being in effect allowed to retain the land taken by force.

As long as the king had no effectual means of punishing disseisors, the only recourse of the ousted party was to a powerful friend or friends. When such aid was available, the disseised landowner would return to his land and attempt to drive off the disseisor. The question of who would ultimately possess the land was thus a question of arms, basically a trial by battle. The history of the times is full of minor and major wars between the powerful lords for power and position. The king at the same time was increasing his strength and attempting to nationally orient his power relative to the local power interests of the lords. The only legal check on that local power was the theoretical bond of loyalty to the king.

Previously, as lords had grown in strength, the king experienced difficulty in making the feudal pyramid work. However, as feudal society became more commercial, the increasing diversification of sources of wealth made the king less dependent on the produce of tenurial lands and services and gave him an independent income. He was thus able to increase his relative strength as well as his prestige. The nationalistic interests of European nations in general at this time also contributed to the nation-building role of the king. It was to be through this growing ability of the king to effect centralization and the feudal image of the king as the top of the pyramid that the development of a national law was to reach fulfillment. Thus, remedies at law became effective sanctions and could eliminate physical force and the size of one's personal army from the actual determination of rights.

Thus, as the power of the king grew strong enough to effectively enforce laws promulgated by him, the number of remedies at common law grew. An attempt was made to give tenants a means of protection from disseisin. By the statutes of 5 and 15 Richard II, the party disseised of his estate was given the right to obtain a criminal indictment against the disseisor for forcible entry and detainer. If convicted under the statute, the disseisor was imprisoned. The practical effect of incarceration, however, was of little value to the disseised party, for there was no provision for restoring the land to him. The retainers of the disseising lord most probably remained on the land until he returned from jail. The remedy thus provided a discouragement of acts of disseisin but did not really aid those already ousted. The statute contained a further loophole in that the indictment might not be brought against a disseisor who had come on the land peacefully and with license, but it later kept the owner from reentering or recovering possession.

The problems inherent in the statutes of Richard II were subsequently resolved by a statute of Henry VI. The statute retained

26 5 Rich. 2, c. 8; 15 Rich. 2, c. 2.
27 8 Hen. 6, c. 9.
the use of indictment for forcible entry and detainer, made forcible
detainer after a peaceable entry criminal, and provided for a decree
of restoration of the disseised to his lands. The decree empowered
the sheriff to evict the disseisor and restore the aggrieved to posses­
sion. The statute of 8 Henry VI was enacted into law by the Massa­
chusetts Bay Colony and by the State of Massachusetts Bay.28 The
statute is commonly called the forcible entry and detainer statute.

Then, in 1825, the Massachusetts General Court became concerned
specifically with the length of time that parties might be kept out of
possession during litigation of title and right to possession. This con­
cern was particularly acute in the area of holdover tenants, that is,
tenants whose leases have either expired or have been terminated,
but who refuse to or otherwise cannot vacate the premises and return
them to the possession of the landlord. The General Court passed
"An Act providing further remedies for landlords and tenants" to
answer the need in this area.29 The landlord or a new tenant who
desired to recover possession of premises after the termination of the
lease of a prior tenant could bring a writ in the courts asking to be
restored to possession. The new tenant brought the action as the
assignee of the landlord.30 The remedy was designed only to try right
to possession and was not meant to replace the action for writ of entry
or other action to try title.31

In 1836 the General Court passed a law stating that henceforth the
act passed in 1825 should be read together with the forcible entry and
detainer statute as being two parts of one statutory remedy.32 The
Supreme Judicial Court in Howard v. Merriam33 analyzed the legis­
lative history of the 1825 and 1836 statutes and made it clear that
the merger of these two remedies was part of a conscious legislative
policy to condemn any keeping of landlords from recovery of leased
premises. The positive side of the policy was the reaffirmation and
strengthening of the property right of the landlord.

Although the statutes of 1825 and 1836 mitigated the harshness
imposed on landlords by holdover tenants taking advantage of lengthy
litigation periods, they created a plethora of new problems. Summary
process is landlord oriented in the sense that the landlord ultimately
gets his premises back if a tenancy has terminated. Landlords now
had an effective and relatively inexpensive method of evicting ten­
ants. With the decline in housing supply relative to the growing
demands upon that supply, the bargaining power of the landlords
has increased and with it the ability to quickly replace tenants if
desired. The market today bears an extremely high rent level. The
incentive thus to charge the highest rent at the lowest level of prop­

29 Acts of 1825, c. 89, §1.
32 R.S. 1886, c. 104, §2.
Property maintenance is great. A complaining tenant can be easily evicted and replaced when his lease expires. Often merely the threat of such fate alone is sufficient to stifle tenant pressure for housing maintenance and improvement. In the context of the problems of modern urban housing, summary process gives the landlord too much remedy. The problem is further complicated by the nature of the forcible entry and detainer statute onto which the landlord remedy was grafted. Forcible entry and detainer involved both a criminal penalty and a decree of restoration to possession. One wonders whether the legislature merged the two remedies merely because of their common form of recovery or whether there was an implied equating of holdover tenants with criminal disseisors. The legislative history is mute on this point.

The law of eminent domain has preserved the power of the state to interfere with individual proprietary rights for the good of society in general.84

The eminent domain power is, however, rarely extended beyond use in emergency situations or land taking for construction of public works and urban renewal. The tenurial relationship of feudal England, if extended to its purest theoretical limits, might have developed into the concept that ownership of land must constantly depend on its use for the furtherance of national and social goals, a concept not unlike the property concepts of present day communist and socialist nations.85 The concept did not spread to this theoretical purity because of the power of English lords to resist such centralization and because neither the times, nor the monarch envisioned such an end as desirable. The needs of William the Conqueror were immediate and simple, the provision of feudal levies and the recognition of the royal primacy. Otherwise his purposes were selfish and not broadly steeped in social consciousness.

This comment, thus, contends that the development of the concept of an individual proprietary right in modern England and the United States is due to two primary causes: the general tendency of English history toward individual rights and inalienable personal freedoms, and the acquiescence in or failure of the Crown to prevent the whittling away of the theory of the tenurial relationship. As the kings of England found alternative sources of wealth and national control in taxation, as the growing strength of individual private commercial and social groupings resisted royal encroachment and set up their own conduct of affairs, the present balance between individual and national power took shape and the concept of separation of powers and the rule of law developed. The king was thus forced to be content with residuary sovereignty and the magnates were freed to conduct themselves without any interference save what limits in law the king or a majority of their peers might succeed in imposing. In many

84 Beekman v. Saratoga & Schenectady R.R. 3 Paige 45, 73 (N.Y. Ch. 1831).
ways, the cycle has now come full circle. The needs of modern society are dictating increased national and group action to cure the problems that individual action has so far failed to solve. Since 1930 there has been a visible shift in the balance between state and individual scope of action. The history of the present day is largely the continuation of the definition of that balance.

Any attempt to evaluate present property law and suggest possible improvements in it cannot proceed without asking the basic questions: Who does the law serve? Is there any justification in the present society for those interests to continue to be favored? The first of these questions is the easiest to answer. What the response to the second question will be, however, is more complex and will depend essentially on what group or groups is giving the answer. A landlord group will have a different response from that of a tenant group. Even assuming that the question is answered, however, there remains the issue of who will act upon the answers given. The political situation of the times will determine how the society acts upon the answers.

The forcible entry and detainer statute gave a criminal sanction. The present summary process remedy does not impose a recognizable criminal sanction on holdover tenants, though it does seem to reflect, by its grafting on to the older statute, a firm condemnation of any infringement of the landlord's absolute property right. To many tenants experiencing the effects of eviction by summary process, the hardship imposed on them may be as harsh as a criminal penalty.

Since 1856, summary process has changed little in substance. Changes have mostly articulated procedural and interpretive issues. The statute remains archaic, principally in that it ambivalently grafts possessory remedies onto statutes of essentially criminal origin. The effect of the grafting is to imply a broad moral and even criminal culpability to all holdovers, without distinction. A holdover tenant who refuses to vacate the premises solely to harass the lessor or merely to defy him may be essentially as evil as a forcible disseisor. However, a tenant who holds over because of old age, illness or inability to find adequate alternative quarters can hardly be placed on such a par. Under the Fourteenth Amendment of the United States Constitution, any statute that actually deals with criminal penalties must clearly distinguish between what is and what is not criminal; it must clearly distinguish culpability from innocence and excuse.

Thus, a statute establishing a public policy of moral indignation based on earlier criminal sanctions should similarly distinguish between the conscious and willful violator and the unwitting or excusable violator.

The failure of a criminal statute to meet the safeguards outlined will bring it into danger of constitutional infirmity under the Fourteenth Amendment's due process clause. A statute operating on an implicit public policy of quasi-criminal origin should, in theory, be equally subject to infirmity. The current crisis in urban housing, the fact that the poor are the ones most affected by the bad aspects
§5.7

PROPERTY AND CONVEYANCING

of the statute, and the threat that both these situations will worsen illustrate the need for change in the present summary process remedy.

With the historical context in mind and in view of the general sociological statements just made, an analysis of the operation of the recent changes in and additions to the summary process remedy must proceed from an inquiry into whether the basic infirmities suggested by the history and sociology of the statute are mitigated. If they are not mitigated, then an examination must be made as to what action should be taken.

A recent Georgia case, now on appeal before the United States Supreme Court, questioned the constitutionality of bond requirements on appeal in summary process cases.86 The Georgia court held that it was not a violation of due process to require the bond, even when a tenant was financially unable to post bond. What the Supreme Court will rule on the issue is not readily predictable. Tenants in Massachusetts will not have to depend on the outcome of the case, however, for the General Court in 1969 eliminated the question by enacting an amendment to Section 5 of Chapter 239, allowing the court to waive the bond requirement if it appears that the tenant has a defense that is not frivolous and that he has insufficient funds to furnish the bond.87

This amendment is a substantial help to tenants. Many issues that counsel could never get beyond the lower court level will now have a chance to be developed by higher courts. While formerly the financial burden of appeal discouraged all but the most wealthy from appealing, now the issues of summary process as they arise in an urban poverty context may be examined more widely. The willingness of the courts to develop these issues will be the measure of the success of this amendment.

Chapter 231 provides that a defendant may allege in defense of any action at law any facts which would entitle him to equitable relief.88 In an action for summary process, there are only a few effective defenses that can thus be raised. If the tenancy was terminated by the landlord through any of the means available to him at law, the propriety of the specific form of termination may be challenged. Fraudulent termination may also be alleged, although it is hard to substantiate. A court may be reluctant to cross over the line into the area of motivation and will refuse to question the intent of the landlord in terminating the lease.89 In such a case the form rather than the substance will be determinative. Insufficiency of notice is another defense. The landlord must comply with the provisions of Chapter

88 G.L., c. 231, §31.
In addition, if the tenancy terminated by expiration of the lease, the principal defense may be extension by the landlord. At expiration, the tenant becomes a tenant at sufferance, and the landlord who acts so as to evidence a willingness that the tenant remain may have created a tenancy at will. Once he has done this he may not maintain summary process until he has legally terminated that new tenancy according to the notice requirements of Chapter 186. Conduct that will evidence such extension is acceptance of rent, rendering of services normally due a tenant, oral permission to remain, and prolonged failure to bring process.

A new Section 2A of Chapter 239 sets up a new defense, retaliatory eviction. This defense has been the subject of much debate in other jurisdictions, but again, the General Court cut off the debate in Massachusetts by making it law. Section 2A states:

It shall be a defense to an action for summary process that such action was in reprisal for the act of the tenant for reporting a violation or suspected violation of law, as provided in section eighteen of chapter one hundred and eighty-six. The commencement of such action against a tenant within six months after the making of such report by said tenant shall create rebuttable presumption that such action is a reprisal against the tenant for making such report.

Section 18 of Chapter 186, mentioned in the amendment, provides for damages of not less than “one month’s rent or more than three month’s rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of the suit, including a reasonable attorney’s fee” for taking or threatening to take reprisals against tenants for reporting suspected violations of housing codes and other municipal codes. Section 18 also creates a rebuttable presumption that receipt of any notice of termination of tenancy except for nonpayment of rent during the six months after the report of suspected violations was motivated by a reprisal intent.

Retaliatory eviction is of course a potent landlord weapon. Tenants who become too much of an irritant by virtue of complaints about needed repairs or by virtue of complaints to the housing authorities can be effectively stifled by threatened eviction upon expiration of lease. Tenants attempting to organize other tenants may also be subject to this retaliation. The amendment to Section 2 making retaliatory eviction a valid defense is a great tenant weapon. However, the six-month period may also place a great hardship on the landlord’s freedom of action because unscrupulous tenants may hold

41 Acts of 1969, c. 701, §2, adding G.L., c. 239, §2A.
over effectively by crying retaliation. The landlord may still rebut the presumption, however. To give any teeth to the retaliatory eviction defense, the General Court had to set some arbitrary time period for measuring the causal relation between eviction and reporting of code violations. Given the advantage formerly held by the landlord in these cases, the amendment sufficiently equalizes the positions of the parties. The amendment, however, only allows the defense in the instance of housing violation reports. It does not cover the case of retaliation for organizing tenant groups. The reason for this is apparently to encourage tenants to work through the municipal agencies to get help, rather than taking self-help.

Section 8, to be discussed next, also seems to discourage self-help. Tenant unions and tenant groups, however, serve a useful and needed function where other means of achieving reform fail. They probably are effective as organizations for neighborhood improvement, for neighborhood public relations, and as an institutionalized method for airing and resolving tenant problems and promoting tenant interest in rented property. They do tend, however, to be adverse to the interests of an administrative agency such as a housing authority, although they need not be. In fact a participatory group such as neighborhood improvement associations or tenant unions is probably a more vital and dynamic group for insuring and bringing about improvements in needed areas than is an administrative body. Section 2 should probably be further amended to encourage landlords and tenants to form arbitration groups and to work together. This can be achieved by including retaliation for organizing tenant groups as a defense in Section 2 and amending the housing code to specifically encourage such local participation.

Section 8A of Chapter 239 provides that there can be no recovery pursuant to Chapter 239 if the premises sought to be recovered are in violation of health code standards and if such violation might endanger or materially impair the health and safety of the inhabitants. The section is qualified, however, by the provision that the rule will only apply if the tenant is not in arrears in his rent, has notified the landlord that he will hereafter withhold rent until repairs are made, and, provided the health department actually inspects the premises and issues a report confirming the existence of the violation and the fact that it endangers health and safety. This also places the burden of notifying the health department on the tenant. The tenant's actions must not be found to have caused the defect, and the landlord must be able to make the necessary repairs without vacating the premises. The section does not apply to lodgers in a hotel or motel or to residents of rooming or lodging houses who have been in residence there for less than three months.

This section again gives the tenant relief in that a landlord may not use the summary process if he is guilty of a certified housing vi-

olation. However, the tenant is deprived of this relief if he is in the least bit in arrears in his rent. Thus tenants who are in arrears cannot use the section as a shield to avoid the consequences of not paying. As such this is probably an equitable policy, as the housing code violation is still punishable under the code sanctions. There is no need to subsidize tenants who refuse to pay rent.

However, many tenants simply do not pay rent on time out of inability. A landlord could thus avoid the consequences of this section in a situation where he probably should be held. Inability to pay rent would prevent an indigent tenant from having the right to an apartment that meets code standards. The section should be amended to state that the tenant may show cause why the rent arrearage should not be held against him.

Section 8A also contains other conceptual difficulties. The bar to the landlord does not become operative unless the housing violation is reported and is certified. This assures that the tenant will not fabricate violations to avail himself of this section. In that sense the condition of certification is useful. Further, it brings the violation to the attention of the authorities before any attempt to evict has been made. There still remains a question of the efficiency with which certifications are made and the time within which the agency will act to verify complaints of tenants.

Again, by stressing reporting to the health department, the statute encourages recourse to administrative agencies and reasserts their authority. The section only applies, however, to violations that endanger safety. No attempt is made to allow tenants to pressure the landlords for minor repairs. Considering that many urban tenants live in dwellings where there are a thousand minor inconveniences for every defect endangering health and safety, and considering that many may be evicted without any inquiry into their financial straits, their family condition, age, or illness save as the individual court seeks to take that into consideration, it would seem that the section should be amended to bar use of summary process when inconveniences and defects of a lesser nature are involved. The best solution would be to set standards of reasonable dwelling and living conditions and extend the estoppel to all cases involving dwellings falling short of those standards. The landlord could then reinvoke summary process by showing that there was good reason why the defects existed or why they had not or could not be repaired.

The requirement that the tenant notify the landlord of violations may now be met by notice to the landlord from the health department or from the inspecting official himself, under the amendment of May 1969. This relieves the pressure on the tenant of confronting the landlord himself. It also has the effect of putting the landlord and the housing authority in direct contact. Perhaps this amendment might also be used to enable fact finding by the health department.

as to why the defect exists such as would be admissible under the improvement suggested above to enable landlord to reinvolve use of the statute.

Section 9 of Chapter 239 provides for a stay of proceedings. The length of time of the stay is subject to change, since the section presently provides for a stay of up to three months or a series of stays not totalling more than three months in the aggregate. The stay is conditioned upon the use of the premises in question as a dwelling by the tenant at the time the stay is requested. The tenant himself, or his surviving spouse, parent or child, must request the stay or stays; he must not be in arrears in his rent; and the tenancy must have been terminated either by law or by the landlord. If there is any default or conduct by the tenant that led to the termination, this section is not applicable.

The major objections to this section stem, again, from the inability of the tenant under the statute to justify or excuse his arrearage or his act causing the termination of the tenancy. Intent and culpability as well as incapacity should be mitigating factors. The statute otherwise continues to punish essentially all holdovers without distinction save as is statutorily excepted.

Section 9 of Chapter 239 contains the same disclaimer as does Section 8 for dwellers in hotels, motels, and lodging houses. The exemption of these premises seems to merely reflect the fact that summary process involves a tenancy situation and not licensee relationships.

Section 10 of Chapter 239 lists the reasons for which a judge in his discretion may grant a stay or stays. It provides that on application of the tenant, the court shall hold a hearing to determine whether to grant a stay. Such a stay may be granted if the judge is satisfied that the tenant cannot secure other quarters and that he has made diligent effort to do so, if he finds that the tenant has made application in good faith and that he will abide by any terms set up by the court, or if he finds other convincing reasons for granting the stay. This section is excellent. It provides the kind of fact finding that the court should be required to do throughout the proceedings in order to treat the litigants equally and mitigate the harsh landlord orientation of the traditional statute.

Section 11 presents additional problems, however, for the tenant seeking aid under Section 10. The section provides that the stay shall be granted and take effect only upon the filing with the court by the applicant of a deposit, consisting of rent owed and such additional money as will accrue during the period of the stay. The court will administer the disbursements to the landlord and may, at its discretion, authorize installment payments into the disbursement fund. While it is desirable to have the court administer and disburse rent payments, the requirement of prior deposit is a hardship for many tenants. Perhaps a waiver for those financially incapable should be included. It might just be enough to require that all rents be paid as they become due directly into the court and thus eliminate any
prior deposit. If the court has determined there is a bona fide cause for granting the stay, it should be relatively simple to determine the bona fides of the tenants payment capabilities. Some consideration should be given to alternative means of securing the landlord his rent if the tenant is totally unable to pay.

The recent amendments to Chapter 239 have done much to mitigate the harsh landlord orientation of the summary process remedy. The suggested changes would further equalize the positions of the parties to the action. In respect to the statutes of other states on this subject, the Massachusetts summary process statute is fairly progressive. It should go still further forward, however, in achieving a more balanced designation of rights. In the last analysis, the quality of summary process is the quality of the state of the law in general. Improvement of the summary process remedy in the direction of more equal treatment for tenants will depend on progress toward that goal in other areas of the law, and more particularly on the willingness of society to effectuate that change. Given the social discontent of the present, it would seem inevitable that some change will come. How and when it will come is a political question.

GLENDON BUSCHER

45 For a discussion of other possible reforms in the landlord-tenant field, see the following law review commentaries: Crawford, Poverty Law and Legislative Change, Howard L.J. 284 (1967); Schohinski, Remedies of the Indigent Tenant: Proposals for Change, 54 Geo. L.J. 519 (1966).