TORTS—RESTRICTION ON SELF HELP—PROPERTY OWNERS NO LONGER HAVE A RIGHT TO REGAIN POSSESSION BY USING REASONABLE NECESSARY FORCE; DEFENDANT IS LIABLE IN TORT FOR INJURIES AND DAMAGES RESULTING FROM FORCIBLE ENTRY REGARDLESS OF WHO HAS TITLE. *Daluiso v. Boone* (Cal. 1969).

Daluiso filed a complaint against Boone to recover compensatory and exemplary damages for personal injuries arising out of trespass to real and personal property. The court found that his complaint, based on the following facts, stated a cause of action in tort for the intentional infliction of emotional distress.[1] Plaintiff, an eighty-five year old man with arteriosclerosis, was the former owner of Melody Ranch.[2] In 1934, he conveyed the ranch to his son, Salvatore, who gave plaintiff permission to reside there for the rest of his life.[3] In 1961, without prior notice to the Daluisos, defendant Boone, an adjacent landowner, and two employees entered part of the ranch and proceeded to move one of the boundary fences to conform to a survey which had been completed in 1956.[4] The survey showed that the fence was located on defendant's property, and therefore he wanted it moved to represent what he believed was the real

1. 1 RESTATEMENT (SECOND) OF TORTS § 46 (1965) provides that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm."

2. In regard to the effect of plaintiff's physical condition upon the liability of defendant, *see* W. PROSSER, LAW OF TORTS § 11, at 51 (3rd ed. 1964), in which he states: "[E]xcept in cases where the defendant has knowledge of the plaintiff's peculiar susceptibility and practices upon it, the distress must be such as a reasonable man of "ordinary sensibilities" would undergo under the circumstances." Prosser also suggests that this knowledge may, in itself, render the conduct in question outrageous.

> Still another basis on which extreme outrage may be found lies in defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct. . . . [T]he gist of the outrage is the defendant's knowledge of the plaintiff's vulnerability, and where there is no knowledge, conduct which is not otherwise sufficiently extreme leads to no liability, even though the plaintiff may in fact suffer serious injury because of it.

Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 50 (1956).

3. Salvatore testified that the plaintiff had always been on the ranch, and that it was part of his life. Although there was no express agreement between plaintiff and his son, the court concluded that a tenancy at will had been established since plaintiff had undertaken to take care of the land.

4. Another neighbor, Salvatore, and Boone shared the cost of this survey and the results were known to all concerned parties. Boone and Salvatore had had discussions concerning the moving of the fence but had never reached an agreement.

boundary line between the two properties.[5] While defendant was moving the fence, plaintiff appeared and requested that he stop; defendant refused. Attempting to protect his and his son's right to the disputed property, plaintiff became engaged with defendant in a heated verbal controversy.[6] This confrontation resulted in plaintiff's "physical, mental, and nervous shock."[7] After determining that defendant knew his conduct was substantially certain to produce plaintiff's injuries, that his conduct was intentional and the proximate cause of plaintiff's injuries, the trial court awarded plaintiff $15,000 in compensatory damages.[8] Defendant contended on appeal that the trial court erred in failing to determine who had title to the land on which the fence was located, claiming a privilege to regain the land by use of any reasonable force necessary.[9] The California Supreme Court *held*,

5. After the trial of the instant action, the appeal of *Daluiso v. Boone*, 269 Cal. App.2d 482, 75 Cal. Rptr. 287 (1969), in an action to quiet title, was decided in favor of Salvatore Daluiso. The court found that the fences indicated the correct boundary line and that the survey was, in fact, incorrect. The results of this action had no effect on the instant appeal, however.

6. For a discussion of property rights as they relate to the tort of infliction of mental distress, *see* 28 A.L.R.2d 1089, § 6, which points out that:

> Even where there is no element of personal danger and the mental disturbance . . . arises solely from the plaintiff's distress at the injury to his property interests, recovery . . . has been allowed in a number of cases where it appeared that the defendant's act amounted to a wilful or malicious trespass, and that the mental anguish was a proximate result of this wrongful act. . . . [W]here the mental distress . . . arose solely as an incident of property damage and the elements of malice or wilfulness did not appear, courts have appeared reluctant to allow such damages.

7. Ferdinando Daluiso, the original plaintiff, died during the pendency of this appeal. Salvatore Daluiso, his executor, was substituted as respondent. "Plaintiff" in the appellate case refers to Ferdinando.

8. This award was not the result of a sympathetic jury; it was a nonjury trial. Defendant never contended on appeal that his conduct did not constitute the tort of intentional infliction of emotional distress, nor did he contend that the damages awarded were excessive.

9. This contention was based on the California Supreme Court holdings in *Canavan v. Gray*, 64 Cal. 5, 27 P. 788 (1833), and *Walker v. Chanslor*, 153 Cal. 118, 94 P. 606 (1908), which held that title was a complete defense to a tort action arising from an owner's forcible entry; they limited a wrongful possessor's remedy to an action under a forcible entry statute.

The applicable statute in effect then and now is CAL. CODE CIV. PROC. § 1159 (West 1955) which provides:

> Forcible Entry Defined: Every person is guilty of a forcible entry who either:
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> 1. By breaking open doors, windows, or other parts of a house, or by any kind of violance or circumstances of terror enters upon or into any real property; or,
>
> 2. Who, after entering peaceably upon real property, turns out by force,

affirmed: apart from any statutory remedy for a forcible entry, the peaceable possessor of real property may recover, in tort, damages to his person or goods caused by the forcible entry of one who is, or claims to be, the legal owner—title is no defense to this action.[10] *Daluiso v. Boone*, 71 Adv. Cal. 503, 455 P.2d 811, 78 Cal. Rptr. 707 (1969).

Daluiso represents a definite change in California tort law. Prior to *Daluiso*, a defendant landowner could forcibly enter his own property and use all reasonable, necessary force to expel a peaceful, but wrongful, possessor. If, as a proximate result, the wrongful possessor was injured, the defendant landowner, although indictable under the Forcible Entry Statute,[11] was absolutely not liable for the injuries in tort; his title was a complete defense. Under the English common law, the landowner had a complete right of forcible entry; the forcible entry statutes made this entry illegal, but the wrong committed was considered to be a wrong against the general public, that is, breaking the peace and the use of self help to settle disputes when courts were available for this purpose. This entry was not considered a wrong against the individual who was injured. This note will discuss the history of this ancient privilege, how the privilege has been affected by statutes of forcible entry, and how various courts, including the California Supreme Court in *Daluiso*, have construed the statutes to regulate this privilege of self help in land disputes.

Under the common law, one legally entitled to immediate possession of land was absolutely privileged to enter and recover possession by using any amount of force necessary to dispossess the wrongful possessor.[12] Regardless of what injuries were sustained by the wrongful possessor, to his person or goods, defendant's title was a complete defense to tort liability. This privilege of self help could be abused, as in cases of excessive force, and then defendant was held liable only for damages resulting from that force which was more than necessary.

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threats, or menacing conduct, the party in possession. (Enacted 1872)

In the instant case, the trial court judge stated that since title was not pleaded, and it was not at issue, it would not be decided by him. The survey results were admitted in evidence, however, since defendant's motivation had a bearing on exemplary damages.

10. Overruling Canavan v. Gray, 64 Cal. 5, 27 P. 788 (1833), and Walker v. Chanslor, 153 Cal. 118, 94 P. 606 (1908).

11. CAL. CODE CIV. PROC. § 1159 (West 1955).

12. 6-A AMERICAN LAW OF PROPERTY § 28.19 (A.J. Casner ed. 1954).

Generally, however, if the wrongful possessor was unwilling to get off the land, defendant landowner was not liable in tort for the use of any force necessary to remove him, including force which resulted in the death of the possessor.[13] The situation existed where "He may take who has the power and he may keep who can."[14]

In an attempt to rectify this situation, to protect those in peaceful possession from violent entries and to preserve the King's peace by encouraging those involved in land disputes to turn to the courts for help, England enacted the Statute of 5 Richard II.[15] This statute partially abrogated the privilege of self help by imposing *criminal* sanctions on anyone, regardless of title, who made a forcible entry onto the peaceful possession of another. The statute, however, did not expressly provide a *civil* remedy for the wrongful possessor or explicitly abolish the privilege of self help in land disputes.[16] A forcible entry was prohibited by the criminal statute, but the question of whether the wrongful possessor had any *civil* remedy against defendant title holder remained unsettled.[17]

Most American states, to encourage state help as opposed to self help, have enacted forcible entry statutes similar to 5 Richard II.[18] The same question, concerning the availability of a civil remedy, arose under the American statutes. The statutes make forcible entry a crime, and an action under the statutes results primarily in punitive and pecuniary damages; usually plaintiff's personal injuries are not compensable in this action.[19] If title is

13. *See* Burnham v. Stone, 101 Cal. 165, 35 P. 627 (1894), in which the court held that an owner of land wrongfully held by another was not civilly liable for the killing of the occupant while resisting the owner's attempt to regain possession without the use of more force than was necessary.

14. Reeder v. Purdy, 41 Ill. 279, 285 (1866).

15. 5 RICH. II (1381, stat. 1, c.7 provides:

> And also the King defendeth, that none from henceforth make any entry into any lands and tenaments, but in case where entry is given by the law; and in such cases not with a strong hand, nor with a multitude of people, but only in a peaceable [lawful] and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and therefore ransomed at the King's will.

16. *See* 13 HALSBURY'S STATUTES OF ENGLAND 840-46 (2d ed. 1949).

17. *See* 41 Ill. at 283, in which the court stated: "[W]e must, therefore, regard a question which one would expect to find among the most firmly settled in the law as still among the controverted points of Westminster hall."

18. *See, e.g.*, CAL. CODE CIV. PROC. § 1159 (West 1955), and CAL. PENAL CODE § 418 (West 1955).

19. CAL. CODE CIV. PROC. § 1174, n.9 (West 1955), illustrates that: "To the extent

held a complete bar to tort liability, plaintiff is without effective remedy for injury to his person or goods. The issue has not been uniformly resolved in this country.[20] "The interpretation placed upon such statutes necessarily controls the rule . . . ."[21]

This issue, oddly enough, was not brought squarely before the English Courts until the mid-nineteenth century and was not settled definitely even at that time.[22] Until 1920, the right of a wrongful possessor, in England, to maintain a civil action against a defendant landowner was sometimes affirmed and sometimes denied. A few of the leading cases illustrate the checkered history of the privilege of self help as a tort defense.

In *Newton v. Harland*,[23] the court held that a landlord who entered and expelled a tenant holding-over after the expiration of his term would be liable in an action brought by the plaintiff for personal damages.

Meriton v. Combs[24] overruled *Newton* in holding that the defendant landowner had a right to turn out a wrongful possessor and seize his goods without rendering himself liable to a trespass action for conversion. Defendant's plea of *liberum tenementum* was accepted as a complete defense to the tort.[25]

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that damages are sought for forcible entry upon property, in excess of actual pecuniary loss sustained, their objectives are punitive and exemplary and they are allowed only in cases of wrongful acts done deliberately or unconscionably."

20. For contrasting views on this issue, *see* 41 Ill. 279, 286 (1866): "We state then . . . that in our opinion the statutes of forcible entry and detainer should be construed as taking away the previous common law right of forcible entry by the owner, and that such entry must be therefore held illegal in all forms of action." 64 Cal. 5, 6, 27 P. 788, 789 (1883), in which the court observed that:

> Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to entry. . . . [T]he rules of the common law are not to be changed by doubtful implication.

21. W. PROSSER, LAW OF TORTS § 23 (1941).

22. Newton v. Harland, 1 Man. & Gr. 644, 666, 133 Eng. Rep. 490, 498 (1840). The court expressed surprise that the question had remained unlitigated for such a long period and said: "It is remarkable that a question so likely to arise, should never have been directly brought before any of the courts sitting in Banc until . . . the present case."

23. *Id.*

24. 67 E.C.L. 788, 137 Eng. Rep. 1101 (1850).

25. *Liberum tenementum*—a plea by the defendant in an action of trespass to real property that the locus in quo is his freehold. BLACK'S LAW DICTIONARY 1066 (4th ed. 1951).

Beddall v. Maitland[26] reaffirmed the *Newton* holding; damages could be recovered in tort by the wrongful possessor. The court held that the forcible entry statutes made a possession obtained by force unlawful, even where it was obtained by the owner. Therefore, title could be no defense to a tort action arising from this illegal act.

In accord was *Hillary v. Gay*,[27] in which the court affirmed a wrongful possessor's right to maintain an action of trespass against defendant landlord for injury to plaintiff's goods resulting from defendant's forcible entry. The court stated that "the conduct of the defendant was unjustifiable . . . . If the defendant had a right to possession, he should have obtained that possession by legal means."[28]

The reasoning in the *Newton, Beddall*, and *Hillary* cases was adopted by a majority of American jurisdictions.[29] These courts recognized the inherent dichotomy of a situation in which title is no defense to an action for forcible entry under the criminal statute, and title is a complete defense to tort liability in a civil action.[30] The majority of American courts have therefore construed their forcible entry statutes as completely abrogating the privilege of self help and thereby the courts have provided a civil remedy in tort against a forcibly entering defendant, even if he is the legal owner, with right to immeiate possession.[31] Prosser comments:

> The majority rule seems clearly the desirable one. In virtually all jurisdictions, a summary procedure exists by which the owner may recover possession by legal process, with only a brief delay. Few things are more likely to lead to a brawl than an evicting landlord, throwing out his tenant by main force. Land cannot be sequestered or removed, and the public

26. 17 Ch. Div. 174 (1881).
27. 6 C. & P. 284, 172 Eng. Rep. 1243 (1883).
28. *Id.* at 286, 172 Eng. Rep. at 1244.
29. 71 Adv. Cal. at 511.
30. The court, in Reeder v. Purdy, 41 Ill. 279, 285 (1866), observed that:
> The law is not so far beneath the dignity of a scientific and harmonious system that its tribunals must hold in one form of action a particular act to be so illegal that immediate restitution must be made at the cost of the transgressor, and in another form of action that the same act was perfectly legal, and only the exercise of an acknowledged right.
31. 5 POUND, JURISPRUDENCE § 142 (1959).

> interest in preserving the peace would seem to justify the temporary inconvenience to the owner.[32]

In 1920, however, the decision in *Hemmings v. Stoke Pages Golf Club*[33] overruled *Newton* and *Beddall* and completely reversed the English position. In *Hemmings*, the court observed: "If the view . . . expressed in *Newton v. Harland* is correct it must follow that the law confers upon the lawless trespasser a right of occupancy the length of which is determined only by the law's delay."[34] The court accepted the view that:

> [T]he plaintiff, having no title to the possession as against his landlord, can have no right of action against him as a trespasser, for entering upon his own land, even with force; for, although the law had been violated by the defendant, for which he was liable to be punished under criminal prosecution, no right of the plaintiff's had been infringed, and no injury had been sustained by him for which he could be entitled to compensation in damages.[35]

This is the English position today and that of a minority of American states, which included California until *Daluiso*.

California has had a forcible entry and detainer statute since 1850.[36] The California Penal Code section 418 provides that:

> Every person using or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in cases and in the manner allowed by law, is guilty of a misdemeanor.[37]

In *Daluiso*, the court states:

> The courts of this state have long recognized that the purpose of these statutes was "to secure a *judicial* adjustment of differences [concerning the right to possession of property]. [A]nd thus prevent the parties themselves from redressing or attempting to redress their own wrongs which is likely to lead

32. W. PROSSER, PROSSER ON TORTS § 23, at 125-26 (3rd ed. 1964).

33. 1 K.B. 720 (1920).

34. *Id.* at 737.

35. *Id.* at 733, citing Newton v. Harland, *supra* notes 22 and 23. The court also points out that: "Ordinarily a criminal prohibition would give a right of action to any person specially injured by the prohibition. It does not in this case because against the person damaged the entry was not wrongful, but rightful . . . ." *Id.* at 746.

36. CAL. CODE CIV. PROC. § 1159 *et seq* (West 1955); See note 9, *supra*.

37. CAL. PENAL CODE § 418 (West 1955), enacted in 1872.

> to serious wrongs against the public or society. . . . To promote this end it has been consistently held that it is no defense to an action brought under the forcible entry statute that the defendant has the title or right to possess the land.[38]

At apparent odds with this policy against self help in land disputes, the courts at the same time refused to construe the forcible entry statute as abrogating the old common law privilege of forcible entry by the title holder.[39] An injured wrongful possessor had no remedy other than an action under the forcible entry statute; the remedy provided by the statute was deemed exclusive.[40] The substance of damages, available under the statute, is restitution of the premises in order to preserve the status quo until the question of title can be adjudicated. Along with restitution, damages for injury to the possessory interest, arising from the forcible entry, are allowed. This includes pecuniary damages such as loss of rents or other profits. Damages resulting from injury to the person or goods of the peaceable wrongful possessor have not been allowed under the statute. Damages for mental pain and suffering have been held too remote.[41] Even in a trespass action for damages arising from a death caused by defendant landowner's attempt to reclaim his property, damages have not been recoverable.[42] In that case, it was held that the defendant owner was not civilly liable for the killing since he used no more force than was necessary to eject the wrongful possessors.[43] The use of more force than that which proximately results in the death of the wrongful possessor is difficult to contemplate. Illustrating the reasoning behind the "exclusive remedy" cases in California and the dichotomy inherent in them, the court reasoned that:

> If the owner of the land . . . makes use of no more force than is reasonably necessary . . . he will not be liable to an action of trespass quare clausum, nor for assault and battery, nor for injury to the occupant's goods, although . . . it becomes necessary to use so much force and violence as to subject him

38. 71 Adv. Cal. at 514-15, 455 P.2d at 818, 78 Cal. Rptr. at 714.

39. *See* cases cited in notes 9 and 13, *supra*.

40. 64 Cal. 5, 27 P. 788 (1883).

41. *See* Anderson v. Taylor, 56 Cal. 131, 38 Am. R. 52 (1880), for a general discussion of damages traditionally available in California in an action brought under the statute.

42. Burnham v. Stone, 101 Cal. 165, 35 P. 627 (1894).

43. *Id.*

> to indictment . . . for making forcible entry . . . The statutes . . . having provided a remedy . . . that remedy is exclusive, so far as the wrongful possessor is concerned; but the public, being interested in preserving the peace, may punish the owner for resorting to force.[44]

Even though the state supreme court staunchly maintained the position of "exclusive remedy" and denied the wrongful possessor a remedy in tort, at the trial court level juries often awarded plaintiffs personal damages.[45] A general feeling permeates these cases that defendant landowner's conduct, his forcible entry, was outrageous behavior, a threat to an orderly, peaceful society, and that the possessor, with or without title, had suffered a compensable wrong. The trial court judge in *Walker v. Chanslor*[46] rendered judgment in favor of plaintiff for actual and punitive damages and stated: "I don't think if they had a U.S. patent they would have any right to go there and force parties who were there wrongfully off the premises. I am not going to try any question of title."[47]

His judgment was overruled by the California Supreme Court. In language and reasoning remarkably similar, the trial court judge in *Daluiso* stated:

> [T]he issue here is in part predicated under these pleadings on a tort which has no relationship whatever to the legal boundary line between two parcels of property; and the gravemen of the tort being the violation of individual rights which are as of then fixed by the fence line and not by the boundry line.[48]

He subsequently added that he did not "intend in this action to make any declaration of who has title to what—that is not before me . . . [I]t is not at issue and has nothing to do with this piece of litigation."[49] He was not overruled, and the previous trial verdicts in favor of the wrongful possessor have been at last vindicated.

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44. *Id.* at 171-72, 35 P. at 629.

45. *See* cases cited in notes 9 and 13, *supra.*

46. 153 Cal. 118, 94 P. 606 (1908). In a controversy over the ownership of certain oil lands, plaintiff, in possession, was wounded in an exchange of gun fire following defendants' forcible entry. The court held that the defendants were not liable in tort for assault and battery since their title was a complete bar to the action.

47. 153 Cal. at 123, 94 P. at 608.

48. 71 Adv. Cal. at 509, n.5, 455 P.2d at 814, 78 Cal. Rptr. at 710.

49. *Id.*

The court limits its holding specifically to a peaceable possessor's action for damages.[50] It does not reach the question of the rights of a third person peaceably, but incidentally, on the land, such as a licensee, invitee, or employee of the possessor. In *Reeder v. Purdy*, the court stated that "the law could not expel him who entered if his entry was a lawful entry, and if not, all the consequences of an unlawful act must attach to it."[51] The consequences of committing an unlawful act should appropriately include the extention of liability in tort for injuries tortiously inflicted, even upon guests or other bystanders. A third party, usually no main party to the land dispute, should be able to maintain a tort action, irrespective of the issue of title. Defendant's forcible entry is unlawful, not only to the peaceable possessor and the public in general but to anyone injured as the proximate result of his unlawful act. If defendant's title is held to be a bar against tort actions brought by third parties, then he has partially regained the common law privilege of forcible entry as to those parties, which is contrary to public policy as expressed by the legislature and our courts.[52] The California Civil Code provides:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.[53]

Surely this should be the criteria of tort liability—untempered by a long outmoded common law privilege.

Daluiso puts a new restriction on self help in California land disputes. Under the new ruling, a landowner making a forcible entry is liable for *all* damages proximately resulting to the peaceable possessor. Judging from the incidents of violence reported in the cases in this area, the threat of indictment for a misdemeanor and liability for pecuniary damages alone was not

50. *Id.* at 518, n.14, 455 P.2d at 820-21, 78 Cal. Rptr. at 716-17.

51. *See* note 14, *supra.*

52. A third party, one not in possession, cannot maintain an action under the forcible entry statute. California courts have construed the statute so that "[t]he remedy is a summary one, given by the statute to protect the possession, and cannot be extended by implication to any other than the real occupants." Treat v. Stuart, 5 Cal. 113, 114 (1855). This situation would be in direct conflict with the public policy expressed in CAL. CIV. CODE § 3523 (West 1955): "For every wrong, there's a remedy." (Enacted 1872)

53. CAL. CIV. CODE § 1714 (West 1955).

a great enough deterrent to self help. This expansion of liability should prove to be an active, strong deterrent to landowners who think they have a right to immediate possession and who contemplate the forceful use of self help.

Daluiso is surprising only because the decision appears to be one which should have been reached long ago. The old tradition of self help in land disputes, so prevalent in the history of the American West, coupled with the natural reluctance of a "wrongful" possessor to press his case are logical explanations for the tardiness of this decision. Wrongful possessors, particularly tenants behind in their rent and without funds for legal advice, would be reluctant, except in cases of extreme outrage, to take their cases to court. With a civil remedy now available in tort, there should be more instances of the injured wrongful possessor maintaining causes of action against forcibly entering defendant landowners. Ancient privileges must give way to civilized methods of settling disputes.

The *Daluiso* decision is in accord with the current trend toward an increasing regard for human safety which is resulting in the elimination of artificial limitations of duty and the old common law defense of title in tort actions.[54] The court in *Rowland v. Christian*[55] pointed out that:

> [T]he special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability and the heritage of feudalism.[56]

In discussing the arbitrary limits of liability relating to the owner and occupier of land, the court notes that California courts have recognized the failings of these common law rules that conferred immunity and that "the common law has moved . . . toward 'imposing on owners and occupiers a single duty of reasonable care in all circumstances.' "[57] The court concludes that

54. Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *See also*, Dillon v. Legg, 68 Cal.2d 766, 441 P.2d 912, 69 Cal. Rptr. 97 (1968).

55. 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

56. *Id.* at 113, 443 P.2d at 564-65, 70 Cal. Rptr. at 100-101.

57. *Id.* at 116, at 443 P.2d at 566, 70 Cal. Rptr. at 102, citing Kermarec v.

although plaintiff's status, as a trespasser for example, may have some bearing on the question of liability, status would not be determinative:

> [W]hatever may have been the historical justifications for the common law distinctions, it is clear that these distinctions are not justified in the light of our modern society. . . .[58]

The basic theory of tort law is compensation, by one at legal fault, to the innocent plaintiff. Regardless of whether or not Daluiso was a wrongful possessor, he was a peaceful, innocent possessor and now our law more fully protects that possession, not only by statutory sanctions against forcible entry but by the availability of a civil remedy. A man's home may not be his castle, legally, but his peaceful possession of that home is protected by law. His right to be free from personal injury arising from a forcible entry is a right paramount to title.

SUSAN PARRY FINLAY

WORKMEN'S COMPENSATION—VICARIOUS LIABILITY BENEFIT TEST APPLIED IN RECOGNIZING EXCEPTION TO GOING AND COMING RULE. *Smith v. Workmen's Compensation Appeals Board* (Cal. 1968).

On December 27, 1965, social worker Charles Smith was fatally injured in a single car accident while driving from his home to the office. Smith's widow was denied workmen's compensation benefits on the ground that her husband's death did not occur while he was acting within the scope of his employment. The California Supreme Court reviewed the order of the Workmen's Compensation Appeals Board. *Held,* annulled: Because Smith was required by his employer to bring his car to work, the going and coming rule[1] did not bar him from receiving workmen's compensation benefits. *Smith v. Workmen's Compensation Appeals Board,* 69 Cal. 2d 814, 447 P.2d 365, 73 Cal. Rptr. 253 (1968).

Compaigne Generale, 358 U.S. 625, 630-31, 3 L.Ed.2d 550, 554-55, 79 S. Ct. 406, 410 (1959).

58. *Id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

1. The rule, as generally stated, is that an employee is not within the scope of his employment while he is going to or returning from his place of work. *See, e.g.,* 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 15.00 (1968) [hereinafter cited as 1 A. LARSON].