

TRESPASS

The defendant is charged with trespass. Section 120 of chapter 266 of our General Laws provides as follows:

“Whoever, without right
enters or remains in or upon
the (dwelling house) (buildings) (boats) (improved or enclosed
land) . . . of another,
after having been forbidden to do so
by the person who has lawful control of [the] premises,
whether directly or by notice posted thereon, . . .
shall be punished.”

In order to prove the defendant guilty of trespass, the Commonwealth must prove two things beyond a reasonable doubt:

First: That, without right, the defendant entered or remained (in a dwelling house) (in a building) (on a boat) (on improved or enclosed land) of another; and

Second: That the defendant was forbidden to enter or to remain there by the person in lawful control of the premises, either directly or by means

of a posted notice.

Commonwealth v. Richardson, 313 Mass. 632, 637, 48 N.E.2d 678, 682 (1943) (the two forbidden acts are phrased disjunctively); *Commonwealth v. Einarson*, 6 Mass. App. Ct. 835, 372 N.E.2d 278, 279 (1978) (municipal ordinance or regulation forbidding trespass after dark must be introduced in evidence).

The first requirement is satisfied by proof that the defendant either entered on the premises without permission, or failed to leave after being requested to do so.

A. *If there was a posted notice.* To satisfy the second element, the

Commonwealth is not required to prove that the defendant actually saw a notice forbidding trespassing. The

Commonwealth is only required to prove that there was a reasonably distinct notice forbidding trespass, and that it was posted in a reasonably suitable place so that a reasonably careful trespasser would see it.

Fitzgerald v. Lewis, 164 Mass. 495, 500-501, 41 N.E. 687, 688 (1895) (notice need not be signed or indicate the basis of its authority).

B. *If there was no posted notice.* To satisfy the second element by

proving that the owner “directly” forbade entry to the defendant, the law does not require a person having control of unposted

premises to be on the premises at all times of the day or night to personally warn off intruders. Such a person may also bar entry by securing the premises with secure fences or walls and with locked gates or doors, and this is considered to be “directly” forbidding entry to the premises.

Commonwealth v. A Juvenile (No. 1), 6 Mass. App. Ct. 106, 108, 373 N.E.2d 1202, 1204 (1978).

NOTES:

1. **“Another’s” property.** Evidence supporting an inference that the property did not belong to the defendant is sufficient to establish that the property belonged to another. *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 263, 423 N.E.2d 6, 8 (1981).
2. **Claim of right.** “A claim of ownership is not a defense to a criminal trespass complaint; it is enough to show that the entry or remaining was ‘without right.’” *Commonwealth v. Fenton*, 24 Mass. App. Ct. 1109, 509 N.E.2d 1224 (1987) (unpublished opinion under Appeals Court Rule 1:28). See *Fitzgerald*, *supra*.
3. **External deck, porch, steps.** An external deck or porch, or steps leading to the front door, are properly regarded as part of a building for purposes of the trespass statute. *Commonwealth v. Wolf*, 34 Mass. App. Ct. 949, 949, 614 N.E.2d 679, 680 (1993).
4. **Holdover tenants.** A trespass charge may not be brought against holdover tenants; instead the owner must resort to civil proceedings. G.L. c. 266, § 120. As to a foreclosing mortgagee’s rights, see *Attorney General v. Dime Savings Bank of New York, FSB*, 413 Mass. 284, 596 N.E.2d 1013 (1992).
5. **Implied license.** Under some circumstances, a person may be privileged to enter onto another’s property to determine whether the person in control wishes to deal with him, and for passage off upon receiving a negative answer. See *Commonwealth v. Hood*, 389 Mass. 581, 589-590, 452 N.E.2d 188, 193-194 (1983); *Commonwealth v. Krasner*, 360 Mass. 848, 848, 274 N.E.2d 347, 348 (1971) (such implied license may extend to some parts of property but not others); *Richardson*, 313 Mass. at 638-641, 48 N.E.2d at 682-683.
6. **Not lesser included offense of breaking and entering.** Trespass is not a lesser included offense of breaking and entering. *Commonwealth v. Vinnicombe*, 28 Mass. App. Ct. 934, 549 N.E.2d 1137 (1990).
7. **Public property.** General Laws c. 266, § 120 may be applied to state or municipal property as well as to privately-owned property. *Commonwealth v. Egleson*, 355 Mass. 259, 262, 244 N.E.2d 589, 591-592 (1969). The model instruction may be adapted for a complaint brought under G.L. c. 266, § 123 (trespass on certain public property).

8. **Related statutes.** See also G.L. c. 266, §§ 121 (trespass with firearms), 121A (trespass with vehicle), 120A (owner of trespassing parked vehicle is prima facie the trespasser), 120D (disposal of trespassing parked vehicle), 120B (abutter's privilege), 120C (surveyor's privilege).