Chapter 1: Property and Conveyancing

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PART I

Private Law

CHAPTER I

Property and Conveyancing

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§1.1. Mortgages: Extensions and modification. Mortgagors (especially those with two mortgages) are sometimes unable to make mortgage payments in timely fashion. A first mortgagee, in order to avert a foreclosure by junior lienors, will frequently be willing to waive potential or actual breaches of his mortgage and to extend payment terms so that payments on the other mortgages may be met.1 As a matter of regular business practice in the Commonwealth, some savings and cooperative banks have agreed with owners of equities of redemption to change the amount of the periodic payments of principal and interest or other terms of the notes and mortgages held by them. In a majority of such cases, this has been done without checking for the existence or seeking the assent of junior lienors.2 The cost of title searching to discover their existence, coupled with the further expenditure of effort, time, and money which would be necessary to gain the consent of junior mortgagees, has deterred such efforts.3 A first mortgagee, who enters into such an arrangement without gaining the assent of junior mortgagees, runs a threefold risk: (1) enforcement of his mortgage may be permitted only in accordance with the original terms of the mortgage; or (2) junior mortgagees may be allowed to redeem the first mortgagee and thereby deprive him of the benefit of his investment; or (3) junior mortgagees may be awarded priority over him.4 In Guleserian v. Fields,5 a case of first impression in this state,

4 Ibid.
5 1966 Mass. Adv. Sh. 1111, 218 N.E.2d 397, also noted in §3.4 infra.
the Supreme Judicial Court dealt with a somewhat narrow but yet exceedingly significant phase of this problem.

In *Guleserian* the mortgagors, in 1960, gave a duly recorded first mortgage on certain premises to the first mortgagee, M-1. The stated maturity date of the note was 1975. The note provided that the mortgagors would pay monthly installments consisting of principal and interest at the rate of 6 per cent per annum. In 1962 the mortgagors executed a further mortgage in favor of a second mortgagee, M-2. Subsequently, the mortgagors sought the consent of M-2 to a proposed agreement between the mortgagors and M-1 under which the principal payments included in the 24 monthly installments next following the execution of such agreement would be postponed until 1975, the stated maturity date of the first mortgage. Interest, however, at the rate of 6 per cent per annum, as specified in the note, would continue to be paid monthly on the outstanding principal balance, which would remain constant during this period of 24 months. M-2 refused to consent to this arrangement and notified the mortgagors that their failure to make payments in accordance with the original tenor of the first mortgage note would constitute a default under the terms of the second mortgage. M-2 relied on the fact that the Statutory Condition of a mortgage provides: "The mortgagor ... shall perform the condition of any prior mortgage" and that the term "condition" includes only those terms which were in effect when the junior mortgage was granted. Accordingly, any departure by the mortgagor (without M-2's consent) from the terms of the prior mortgage which were in effect when the junior mortgage was granted constitutes a failure to "perform the condition of [the] prior mortgage" and is thus a breach of the second mortgage. M-2 also advanced the cogent argument that such an arrangement would impair the security interest of M-2 in the property, because his equity in the property would remain constant for 24 months rather than steadily increase as the first mortgage was paid off. Thus, in the event of a default on the first mortgage, M-2 would be required to pay more than the amount he would otherwise pay in order to redeem the first mortgage and to be subrogated to the rights of M-1.

In the declaratory judgment action brought by the mortgagors, the Supreme Judicial Court sanctioned the use of the proposed agreement. The majority of the Court, citing what has been referred to as the "universal rule," noted that the authorities hold that an extension of the time for payment, without an increase of the principal or interest payable with respect to the secured indebtedness, may be made by a holder of a first mortgage without the consent of junior encumbrancers and without loss of priority. It also pointed out that General Laws, Chapter 168, Section 36, which authorizes savings banks to make

6 G.L., c. 183, §20.
8 Notes, 76 A.L.R. 574 (1932); 98 A.L.R. 848 (1935); 150 A.L.R. 551 (1944).
certain changes under prescribed conditions in the terms of mortgages, draws the attention of junior encumbrancers to the possibility that a savings bank mortgage may be extended. A similar warning was also deemed to have been given by the special covenant of the first mortgage by which the mortgagors were to remain liable notwithstanding any extension granted to any subsequent holder of the equity of redemption or any other person. It disposed of the argument based upon the Statutory Condition that "the mortgagor . . . shall perform the condition of any prior mortgage" by stating that there could be no default in the performance in the "condition" of the prior mortgage where M-1, the party to whom payment is due, has agreed to a postponement of the date of payment. Furthermore, the Statutory Condition relied upon by M-2 requires the mortgagor to perform "any obligation secured at the time provided in the note, mortgage or other instrument or any extension thereof." 9

By the proposed extension agreement the time for the performance of "the [first mortgage] note . . . or any extension thereof" would be changed, so that there would be no breach of the statutory condition with respect to payments of principal on the "prior" first mortgage, and also no failure to "perform the condition of" the first mortgage. 10

Unfortunately, the Court rejected M-2's contention that its security was impaired by the proposed agreement without offering any clear rationale for this result. 11

Mr. Justice Spiegel concurred in the result reached by the Court but not in its reasoning. He felt that the proposed agreement would impair the security interest of M-2. He also stated that the extension contemplated by the Statutory Condition was an extension of the date of maturity of a traditional mortgage in which the principal amount became due at maturity and not a change in the form of the mortgage from self-amortizing to such a traditional mortgage. "The statutory condition was enacted . . . at a time when self-amortizing mortgages were rare. I think it is a fair assumption that in 1913 the Legislature did not contemplate that some years in the future the self-amortizing mortgage would become commonplace." 12 Nevertheless, he also sanctioned the proposed agreement because it was an explicit condition of the first mortgage that the time for "payment of any of said indebtedness (emphasis supplied) may be extended." 13

By permitting the mortgagor and M-1 to enter into such an arrangement the Court avoided an anomalous and inequitable result. The second mortgagee would have had the Court allow a junior mortgagee to make extensions so that payments on the prior encumbrance could

9 G.L., c. 183, §20 (emphasis supplied).
11 Ibid.
12 Id. at 1120, 218 N.E.2d at 404.
13 Id. at 1121, 218 N.E.2d at 405 (emphasis supplied by Court).
be made and the foreclosure of the first mortgage averted, so as to maintain the continuance of the second mortgage. Yet, the second mortgagor would have the Court deny this right to the first mortgagor. A senior encumbrancer would, under the second mortgagor's theory, have had no means of preserving his own mortgage in the event the mortgagor was in financial difficulties, although a junior mortgagor would have complete flexibility in this respect.\footnote{14 Brief for Plaintiff, p. 13, Guleserian v. Fields, 1966 Mass. Adv. Sh. 1111, 218 N.E.2d 397.}

The second mortgagor's contention that its security is impaired by such an arrangement can be answered by noting that it is pure speculation whether an extension of this sort adversely affects the economic situation of the second mortgage. It may be possible that the extension results in a preservation of all mortgages, or that the second mortgagor's equity has actually increased because of a general increase in the value of real estate.\footnote{15 See Brief for Savings Bank Association of Massachusetts and Massachusetts Cooperative Bank League, Amici Curiae, p. 19, id.}

The question presented to the Court was a relatively narrow one. It merely had to decide whether modifications with respect to intermediate payments are permissible. It is unclear whether, and to what extent, the Court would sanction extensions or modifications made at higher interest rates or with incidental terms that are more onerous than the original terms.\footnote{16 Meislin, Extension Agreements and the Rights of Junior Mortgagees, 42 Va. L. Rev. 939 (1956).} In this respect it is unfortunate that the Court did not give a clear indication as to the legal significance of General Laws, Chapter 168, Section 36. Instead, the Court stated:

\begin{quote}
A brief filed by amici curiae places emphasis upon G.L. c. 168, §36, par. 4 (authorizing savings banks to make certain changes in the amount of periodic payments under mortgages); see amendment by St. 1962, c. 50, §6 .... The statute, of course, confirms the authority of the bank, within its statutory powers, to make an extension like that now proposed. Apart from the statute, however, the authorities, already cited, show an extension of the time for payment may be made. . . .\footnote{17 1966 Mass. Adv. Sh. 1111, 1116, 218 N.E.2d 397, 402.}
\end{quote}

It is unclear from this language whether the Court is merely construing the statute as confirming the corporate authority of a savings bank to enter into such an agreement, or whether it considered the statute to have the legal effect of preserving the priority of the first mortgage as against junior encumbrances. If the latter, the decision may have wide-reaching ramifications. The amici curiae brief relied upon a pre-1962 version of the statute.\footnote{18 Brief for Savings Bank Association of Massachusetts and Massachusetts Cooperative Bank League, Amici Curiae, pp. 7-8, Guleserian v. Fields, 1966 Mass. Adv. Sh. 1111, 218 N.E.2d 397.} In 1962 (prior to the execution of the second mortgage) the statute was amended so as to authorize changes not only
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in the "amount of the periodic payments of principal or interest," but also of "any other terms or provisions of any note or mortgage." If the statute is construed as affecting the question of priorities, its impact may now not be limited merely to modifications in intermediate payments.

Although the point was not emphasized anywhere (to the author's knowledge) it is interesting to note that the statute, even in its pre-1962 form, provided: "Neither the note evidencing the loan nor the mortgage securing the same shall be prejudiced by any such change." A strong argument can be evolved, based upon this language, that the statute goes beyond confirming the bank's corporate authority and that it preserves the priority of the first mortgage.

Another interesting facet of this decision relates to the question of what junior encumbrancers can do to avoid the announced result. The majority opinion assumes that a second mortgagee can protect himself by inserting an express condition in his mortgage obligating the mortgagor to continue, without any extension or modification, to pay the first mortgage in accordance with its original tenor. Assuming that the second mortgagee can so protect himself, we then are placed in a dilemma if the first mortgagee, by specific language in his mortgage, can do anything to counter such a measure by the second mortgagee. Furthermore, one may speculate whether such measures and countermeasures are available under Mr. Justice Spiegel's opinion, which places heavy reliance upon the explicit terms of the first mortgage. This area may well be the next battleground in this corner of the law.

§1.2. "Straw" or "nominee": Avoidance of personal liability. A "straw" or "nominee" is frequently utilized in a real estate transaction in order to achieve a variety of objectives. Among the manifold uses of a "straw" are the following:

(1) A prospective purchaser of property may desire to avoid the publicity which occasionally is incident to a sale. He may cause title to be taken in the name of a straw.

(2) A straw might be used in an attempt to enable a prospective purchaser to acquire title to property which he could not otherwise obtain.

(3) A prospective seller of property may wish to avoid making any warranties to a purchaser. In an effort to achieve this end, he might convey to a straw, who in turn sells the property to a new owner.

(4) A real owner might attempt to put his property beyond the reach of his creditors by conveying the property to a straw.

19 G.L., c. 168, §36, par. 4.
20 Ibid.

(5) A straw might be utilized in an attempt to avoid paying a broker's commission.

(6) A straw might be used in an attempt to avoid personal liability on a mortgage note.

(7) A prospective purchaser of realty may desire to avoid subjecting the property to his (or her) spouse's claim of dower or curtesy. In an attempt to attain this objective, title might be taken in the name of a straw.

It should be noted that the courts do not always sanction the use of a straw to accomplish these objectives. They are cognizant of the fact that a straw may be employed in both legal and fraudulent schemes.\(^2\)

In *Lee v. Ravanis*,\(^8\) the Supreme Judicial Court was concerned with an attempt to use a straw to avoid personal liability on a mortgage note. As a result of the decision in *Lee*, a prospective seller of real estate who plans to take back a purchase money mortgage and note must be extremely cautious and prudent, lest his rights therein be rendered worthless by the buyer's use of a straw. The *Lee* case involved an action brought by a buyer for the breach of a purchase and sale agreement and to recover a deposit. The written agreement specified that the plaintiff, Lee, would be referred to as the "BUYER" throughout the contract. There was a provision which set the purchase price at $75,000, on which $2000 had "been paid as a deposit" on the day of the agreement and on which $47,000 would be paid in cash upon delivery of the deed. The balance of the price ($26,000) was to be paid by the execution of a note and purchase money mortgage "from the BUYER to the Seller." However, the agreement was modified immediately after its execution so that Lee was to pay down $5000 in cash (including the $2000 deposit already given). The balance of the purchase price was to be financed by a first mortgage of $44,000 to be given to a bank and a second mortgage (purchase money) of $26,000 to be given to the sellers.

The controversy arose out of a provision calling for the premises "to be conveyed by a good and sufficient quitclaim deed running to the BUYER, or to the nominee designated by the BUYER by written notice to the Seller at least seven days before the deed"\(^4\) was to be delivered. Lee exercised his option to designate a nominee. He designated a corporation which he had formed for the sole purpose of taking title to the six parcels of land involved. The corporation had no substantial assets other than its prospective equity in the six parcels to be conveyed. The seller, relying on the provision requiring the balance of the purchase price to be paid by "the execution of note and purchase money mortgage from the BUYER to the Seller," refused to convey legal title to the corporation unless Lee either made or personally endorsed the second mortgage note. Lee indicated that he

\(^2\) Ibid.

\(^3\) 349 Mass. 742, 212 N.E.2d 480 (1965), also noted in §5.3 infra.

\(^4\) Id. at 743, 212 N.E.2d at 480.
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would not personally endorse the purchase money mortgage given by
the corporation. The defendants thereupon refused to convey and
refused to refund Lee's deposit. They relied on a provision permitting
the seller to retain such a deposit if the buyer "shall fail to fulfill the
BUYER's agreements herein."

The issue before the Court was whether the word "BUYER" en-
compased a nominee. A majority of the Court pointed out that the
provision which required the balance "to be paid by the execution of
a note and purchase money mortgage... from the BUYER to the
seller" required that both the note and the mortgage be given by the
same person. The Court then stated that once title was in the name of
the nominee he would be the only one who could give both the note
and the mortgage. The Court further pointed out that

... article 5 of the agreement provided that "if the title to said
premises is registered, said deed shall be in form sufficient to
entitle the BUYER to a certificate of the registration of the title."
Obviously only the grantee can register the land. Therefore, if the
parcel in question has been registered land the word "buyer" in
that instance would have to mean nominee. Otherwise article 5
would be meaningless.

Justices Cutter and Spalding dissented and were of the view that
since the provision calling for the execution of a note and mortgage
from the "BUYER to the Seller" was language specially prepared for
this agreement, it was to be preferred to the balance of the agreement
which was on a printed form of the general type sold by law stationers.
They interpreted this specially prepared language as expressly calling
for Lee's personal note, since Lee was defined in another part of the
agreement as the buyer. They also accurately pointed out the drafting
"lesson" of the majority decision: "... vendors in the future should
protect themselves by wholly clear language concerning the form of
payment or by striking out or modifying references in printed forms
to the use of nominees."

The majority opinion distinguishes the situation of an assignee of
a vendee from that of a nominee or straw. It concedes that a vendor
cannot be obliged to accept the obligation of an assignee. It differ-
entiates between the nominee and assignee on the basis that "[a]
nominee has no 'property in or ownership of the rights of a person
nominating him.'" It then proceeds to point out that the use of a
nominee is uniformly recognized as an approved technique for
limiting liability in real estate transactions and that this purpose will

5 Id. at 744, 212 N.E.2d at 481.
6 Ibid. Other provisions relied upon by the majority are cited id. at 745 n.2,
212 N.E.2d at 482 n.2.
7 Id. at 748, 212 N.E.2d at 484.
9449 Mass. 742, 745, 212 N.E.2d 480, 482 (1965).
be frustrated if the true buyer is compelled to endorse the note. It also seems to hold, implicitly at least, that the seller could not have justifiably expected the personal endorsement of the real buyer when it states that "... we can see no purpose in any reference to a nominee if the buyer is obliged to incur liability."\(^\text{10}\)

If this had been an action for specific performance, and the Court had decreed specific performance in favor of the nominee corporation which then executed a note not containing the personal endorsement of the true owner, an interesting problem might develop in the event the nominee defaulted on the purchase money mortgage and note. The seller would then claim that the nominee, as agent of the true owner, had a right of indemnification and exoneration against the true owner, which the seller might attempt to reach as a creditor of the nominee. In the prior decision of *Central Trust Co. v. Rudnick*,\(^\text{11}\) it was held:

If it appears that all the parties to the transaction knew that the intervention of the agent was entirely for the purposes of avoiding personal liability upon one of the parties, then it is difficult to see how such an agent could have a valid claim against his principal to be exonerated from liability, or how a third person, who has entered into a written contract with such an agent and principal . . . and accepts the note of such agent . . . can successfully claim that the agent or straw was not primarily, but only secondarily, liable on the note and seek to reach and apply the right of the straw to compel payment of the note by the principal.\(^\text{12}\)

Nevertheless, that case may be distinguished on the basis that the agreement involved therein specially called for a note to be executed by the true owner or his nominee.

The problem posed in the previous paragraph assumes that equity would have decreed specific performance in the circumstances present in the *Lee* case. One may speculate whether a court of equity, guided by other considerations, might not have reached a different result.

**§1.3. Tenancy by the entirety: Proceeds from sale.** One of the more intriguing questions dealt with by the Supreme Judicial Court during the 1966 Survey year related to the existence of a tenancy by the entirety in personal property. At one time there was considerable doubt whether a tenancy by the entirety could exist in personalty.\(^\text{1}\) This uncertainty was based on the premise that after having reduced his wife's personal property to possession, the husband gained full title thereto.\(^\text{2}\) This barrier to the recognition of an estate by the entireties

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\(^{10}\) Id. at 746, 212 N.E.2d at 482 (emphasis added).

\(^{11}\) 310 Mass. 299, 37 N.E.2d 469 (1941).

\(^{12}\) Id. at 247, 37 N.E.2d at 474.

§1.3. \(^1\) Note, 64 A.L.R.2d 8, 14 (1959).

\(^2\) Ibid.
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has generally been removed by the modern married women's property acts and the weight of authority now holds that a tenancy by the entirety may exist in personalty as well as realty.3

In Smith v. Tipping,4 the Court was concerned with another interesting facet of this problem. It was presented with the issue of whether a tenancy by the entirety continues to exist in the proceeds of the sale of real estate held by the entirety. In a number of prior analogous situations,5 the Court had answered the question in the affirmative. Yet, when the identical issue arose in Sondheim v. Fenton,6 the Court was able, because of the factual pattern of that case, to avoid a resolution of the issue. In Sondheim v. Fenton, H and W, husband and wife, owned realty as tenants by the entirety. They agreed to sell the premises to X. On the agreed upon closing date X paid part of the purchase price, but not all of it, to H and W. Because of X’s failure to pay in full, the deed was not delivered to him at that time. Instead, the deed, signed by H and W, was left with their attorney. A short time thereafter H died. Subsequent to H’s death, X paid the balance of the purchase price to the attorney, who thereupon gave him the deed. The Court held that W was entitled to the entire proceeds on the ground that there was no conversion of the realty into personalty until the purchase price had been paid in full. Since the land tenancy had not been terminated prior to H’s death, W was awarded the entire proceeds as the surviving spouse. This technique of avoiding the issue has been employed by other courts as well.7 In Smith v. Tipping,8 the Court faced the issue squarely and held that “proceeds of the sale of real estate held by the entirety are personal property held by the entirety.”9 Furthermore, the tenancy by the entirety endures unless and until a spouse has by some “act or deed” divested himself of his interest.10

From the vantage point of Internal Revenue Code, Section 2515, however, one caveat is in order. Under that section a spouse who has furnished all the consideration for the purchase of a parcel of real estate may take title as tenant by the entirety (or joint tenant) with his spouse without paying a gift tax, unless he affirmatively elects to treat the transaction as constituting a gift at that time. Unless such an election is made, there is no taxable gift unless and until there is a “termination” of the estate. Although Smith v. Tipping, which decided the issue from the perspective of state property law, held that the tenancy by the entirety continues to exist even after the property has been sold, this result may not necessarily follow with respect to

3 Id. at 23. See also 4 Powell, Real Property §622 (1965 Recompilation).
5 See cases cited id. at 592, 211 N.E.2d at 232.
7 See 4 Powell, Real Property §622 (1965 Recompilation).
9 Id. at 592, 211 N.E.2d at 232.
10 Ibid.
whether there has been a "termination" of the estate for the purpose of Section 2515. Under the Regulations, a sale of realty held by the entirety results in a "termination" of the tenancy unless the following conditions are satisfied: (1) there is no division of the proceeds of the sale, and (2) on or before the due date for the filing of the gift tax return, the spouses enter into a binding contract for the purchase of other real estate, which realty is actually purchased within a reasonable time thereafter and held by the spouses in an identical tenancy.

§1.4. Conveyances between spouses. As a general rule, a conveyance (upon delivery of the deed) is valid as against the grantor, his heirs and devisees, and persons having actual notice of it, even before it is recorded in the registry of deeds. General Laws, Chapter 209, Section 3, creates a major exception to this rule in the case of a conveyance between spouses. Under that statute, a conveyance between husband and wife has no effect "either in passing title or otherwise" until recorded. In the leading case of Erickson v. White, the Supreme Judicial Court construed the statute strictly and held that a deed given by a wife to her husband but not recorded until after her death was of no effect at any time and was wholly inoperative. The rationale of the decision was that, under the terms of the statute, title had not passed prior to the death of the grantor. Upon the grantor's death, title vested in the grantor's heirs as intestate property. To permit the instrument to become effective upon its recordation subsequent to the grantor's death would result in giving the instrument purporting only to be a deed the effect of a will. "A void instrument cannot be thus resurrected."

The 1966 Survey year case of Hamlet v. Hamlet indicated, however, that there are limitations on the scope of Erickson v. White and that the Court will intervene so as to prevent one spouse from perpetrating a fraud on the other spouse. In Hamlet, a wife brought a bill in equity against her husband seeking to enjoin him from transferring or encumbering certain real estate and to order him to return to her a deed to the premises which he had originally delivered to her. The material averments of her bill were the following. The parties were married in 1956. From 1948 until 1963, both before and after the marriage, the husband acted as the petitioner's attorney and "advised her in her financial and legal affairs." In 1958 the husband conveyed the premises from himself to himself and the wife as tenants by the entirety and delivered the deed to the wife. After the deed was delivered to the wife, she gave the deed back to the husband "upon his representation that he would, as her attorney and fiduciary agent," record it. When the husband made this representation he did not


3 Id. at 453, 193 N.E. at 26.
intend to file the deed and he never has filed the deed for recordation. One of the husband's defenses was that under Chapter 209, Section 3, a conveyance was wholly inoperative prior to recordation of the deed. In rejecting this contention and reversing a decree of the lower court dismissing the bill, the Supreme Judicial Court stated:

Although under G. L. c. 209, §3, the conveyance of the real estate had no effect prior to recording, the plaintiff did have rightful possession of the document of conveyance. The defendant procured that document by fraud. . . . Therefore, the plaintiff may maintain a bill in equity to recover it, just as she might maintain a bill in equity to recover any other chattel taken from her by fraud. 6

§1.5. Purchase and sale agreements: Savings clauses. Quite often, a purchase and sale agreement contains a clause to the effect that "if the seller shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease." Despite the breadth of language employed, this type of clause does not necessarily give the seller a free hand. In the leading case of Old Colony Trust Co. v. Chauncey, 1 the Supreme Judicial Court interpreted this clause as meaning that "if it turns out that without fault on the part of the defendants subsequent to the execution of the contract they have a defective title, then, after refunding payments made, all obligations of both parties shall cease." 2 Thus, in order to come within the protective aegis of the saving clause the seller must not have been at "fault." To a very considerable extent, the determination of whether the seller was free from fault is a factual inquiry. 3 In a prior volume of the ANNUAL SURVEY, 4 this author noted the undesirability, from a planning point of view, of delegating the determination of fault to the vagaries of a factual inquiry.

The most recent case construing such a saving clause is Sawl v. Kwiatkowski. 5 In this case the seller gained title to the locus, formerly held by her and her husband as tenants by the entirety, upon his death in 1953. As administratrix of her husband's estate, she did not include the premises in the estate inventory, and the Massachusetts Inheritance Tax Bureau was never notified of the husband's interest

5 Id. at 682, 212 N.E.2d at 247.

§1.5. 1214 Mass. 271, 101 N.E. 423 (1913).

2 Id. at 273, 101 N.E. at 424 (emphasis added).


5 349 Mass. 712, 212 N.E.2d 228 (1965), also noted in §5.3 infra.
in this realty. A master found that there was at least a reasonable probability that an inheritance tax was owed on account of the seller's acquisition of title as surviving tenant by the entirety and the probability of the existence of an inheritance tax lien was sufficiently great to render the title nonmarketable. The seller asserted this defect in the title as a justification for her failure to perform the purchase and sale agreement. The Court sanctioned the invocation of the saving clause by the seller and found no fault on the part of the seller. Evidently the vendor's failure, at least prior to the execution of the contract, to notify the inheritance tax authorities and discharge the lien "was not deliberate on her part, but . . . resulted from . . . lack of knowledge."\(^6\) The Court defined fault as meaning "conduct by the vendor subsequent to the purchase agreement and tending to impair the vendor's title. . . . It does not include mere inaction concerning a then existing defect of which the vendor was not aware when the agreement was executed."\(^7\)

**§1.6. Extrinsic evidence: Admission to alter documents.** Ordinarily, extrinsic evidence is not admissible to alter written instruments which completely and unambiguously dispose of property.\(^1\) However, there are situations in which a court will admit extrinsic evidence when construing a deed or will.\(^2\) In fact, the Supreme Judicial Court did so on two occasions this year. The case of *Reder v. Kuss*\(^3\) involved property which was purchased by two immigrants, Anna Kuss, now deceased, and the petitioner. The petitioner had contributed the majority of the funds for the purchase of the property and, although both he and the decedent lived on the property, it was the petitioner who managed the property and paid for repairs, taxes, and insurance and other costs of maintenance out of his own funds. Petitioner testified that "[t]here was talk and understanding that if [the petitioner] died she [Anna Kuss] would get the property,"\(^4\) and the trial judge found that both the decedent and the petitioner expected to have the property pass to the survivor of the pair. However, the deed, which was complete and unambiguous, indicated that the property was held by the petitioner and decedent as tenants in common. The Court held that when there has been a mutual mistake with respect to a material fact or matter, equity has traditionally reformed instruments so as to make them conform to the true intention of the parties. It affirmed a decree by the trial judge that the instrument be reformed so as to create a joint tenancy upon the basis of a mutual mistake made by non-English speaking, uneducated immigrants.

The other recent decision in which the Supreme Judicial Court

\(^6\) Id. at 714, 212 N.E.2d at 229.
\(^7\) Id. at 715, 212 N.E.2d at 230.

\(^1\) See Wigmore, Evidence §2641 (3d ed. 1940).
\(^2\) See, e.g., id. §2463.
\(^4\) Id. at 860, 217 N.E.2d at 904.
admitted extrinsic evidence was *Allen v. Mutual Acceptance Corp.*\(^5\)

In this case the Court reaffirmed the proposition that parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage.\(^6\) In doing so it relied upon evidentiary factors which have frequently been utilized to establish the absolute conveyance as a mortgage.\(^7\)

**§1.7. Real estate tax exemption.** General Laws, Chapter 59, Section 5, grants an exemption from the real estate tax in the case of certain elderly persons who have satisfied the detailed requirements of that statute. During the 1966 SURVEY year this statute was the subject of judicial scrutiny in a trilogy of cases.

In *Board of Assessors of Everett v. Formosi,*\(^1\) the taxpayers (husband and wife), as tenants by the entirety, owned a building consisting of two apartments and a store. The taxpayer-owners occupied one apartment as their domicile. The building was assessed for $7500. Section 5, par. Forty-first, in relevant part provides for an exemption "to the amount of four thousand dollars, . . . of a person who owns the same jointly with his spouse, either of whom is seventy years of age or over, and occupied by them as their domicile." The assessors recognized the exemption only to the extent of one third of the total assessed value on the ground that when only a part of a parcel of real estate is used as the domicile of the elderly taxpayer, only a proportionate part of the total assessed value is eligible for the exemption. The Supreme Judicial Court affirmed a decision of the Appellate Tax Board which had reversed the assessors and had granted the full $4000 exemption mentioned in the statute. Mr. Justice Cutter distinguished a series of cases\(^2\) involving the charitable and religious exemptions under that statute. These cases had granted only a partial exemption when only a part of a parcel is used for the exempt purposes. Mr. Justice Cutter stated:

> Those exemptions are based on what the Legislature had considered to be a desirable use, in the public interest, for a religious or a charitable purpose, and not primarily at least upon the financial status and needs of the owner. The exemption clause (§5, Forty-first), on the other hand, rests upon the financial exigencies of the elderly owner and his spouse, and in some degree resembles the exemptions given to certain deserving and needy veterans.\(^3\)

The Court also relied upon the presence of clauses granting partial

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\(^6\) Campbell v. Dearborn, 109 Mass. 130 (1872).

\(^7\) 4 American Law of Property §16.48 (Casner ed. 1952).

\(^1\) 349 Mass. 727, 212 N.E.2d 210 (1965).

\(^2\) Id. at 729, 212 N.E.2d at 211.

\(^3\) Id. at 729-730, 212 N.E.2d at 211-212.
exemptions in other parts of the statute, and the absence of such a clause here.

The second case in the trilogy is *Brease v. Board of Assessors of Peabody*. In this case X had conveyed realty to Y, the deed containing the statement that “the grantor reserves the right to occupy the premises with the grantee during the term of his natural life.” General Laws, Chapter 59, Section 5, par. Forty-first, Proviso (c), provides that “in the case of real estate owned by a person jointly or as a tenant in common with a person not his spouse, the amount of his exemption shall be that proportion of four thousand dollars which the amount of his interest in such property bears to the whole value thereof.” The majority of the Court construed the deed as reserving a life interest in X (for the life of X), as a tenant in common (during his lifetime) with Y, who also was deemed to be the owner of the remainder in fee simple. It also held that X’s concurrent life estate was a sufficient property interest to entitle him to the recognition of the exemption under Proviso (c). In reaching this result the Court, sub silentio at least, rejected other plausible constructions of the deed, such as the notion that X had retained a mere license to use the premises. The Court explicitly rejected the suggestion that X had an estate pur autre vie for the life of Y. After having thus elevated X’s interest to a concurrent life estate, the Court proceeded to interpret the phrase “real estate owned,” used in Proviso (c), as encompassing not only fee simple interests but also life interests. It is the author’s opinion, however, that Proviso (c) probably does not extend to non-freehold interests, such as tenancies for years.

The author has great difficulty, however, in reconciling the result and rationale of these cases with those of *Kirby v. Board of Assessors of Medford*, also decided this Survey year. In *Kirby* an elderly taxpayer transferred a parcel of real estate to a revocable inter vivos trust. The Court characterized the trust as being essentially a “dry trust” and assumed that the “trustee would not use the power of leasing or selling the house without Kirby’s approval, while Kirby [the elderly taxpayer] continued able to give or withhold approval. In every beneficial sense, he was its owner.” Although the Court recognized that, for many purposes, the settlor of a revocable inter vivos trust is deemed to have outright ownership of the res, it refused to sanction an exemption in this case on the ground that Section 5, par. Forty-first, requires not only ownership of a sufficient beneficial property interest but also ownership of a record legal interest. In the

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8 Id. at 398-399, 215 N.E.2d at 102.
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process of reaching this result the Court abandoned the liberal and beneficial bent adopted in *Formosi*, and minimized the policy enunciated therein of protecting elderly taxpayers against financial exigencies. Instead, it applied the principle of strict construction of exemption provisions. The Court also relied upon the fact that Section 5, par. Forty-first, makes no reference to property held in trust, while Section 5, par. Third, specifically exempts certain realty held in trust for a charitable organization.

§1.8. Legislation. The most noteworthy of the various bills filed in the real estate field this 1966 SURVEY year were two bills which failed to receive legislative approval. One of these bills pertained to the interesting theoretical problem posed by the *Ayer* case, while the other dealt with charges for title examinations, a subject containing broad economic ramifications for the public, the bar, and lending institutions.

*Ayer v. Philadelphia & Boston Face Brick Co.* focused on the problems of estoppel by deed and record notice, in legal juxtaposition, one to the other. In simplified form, the issue posed by the *Ayer* case may be stated as follows: At a time when O is the actual and record owner of a parcel of realty, X executes and delivers to A a general warranty deed in which X purports to convey this parcel to A. A records this deed promptly. Subsequently, O conveys the parcel to X, who records his deed promptly. After receiving title from O, X executes and delivers a deed to the premises to B, who has no actual notice of the deed to A and who has paid valuable consideration for the realty. Does A or B prevail? A's claim is based on the reasoning that when O conveyed the premises to X, X's after-acquired title inured to the benefit of A under the doctrine of estoppel by deed; since the deed to A was recorded, B is deemed to have constructive or record notice of its contents. B's argument in these circumstances would be that it would impose an intolerable burden on a subsequent purchaser and his title searcher to require them to check out each prior owner in the chain of title in the grantor index for a period of time prior to the time that such owner is listed as having acquired title. In *Ayer* Chief Justice Holmes resolved this dilemma in favor of A. Although on the facts of the case this was not an unjust result, the principle evolved therefrom is out of tune with the needs of conveyancing. In fact, one commentator has pointed out that the practicing bar has persistently overlooked the *Ayer* doctrine and that searches in the grantor index commence only from the date that the owner in question became vested with record title. Another anachronistic aspect of the case is


2 Ibid.


that Holmes failed to discuss the case of *Morse v. Curtis*,\(^5\) decided eight years earlier, in which Mr. Justice Morton displayed an understanding attitude toward conveyancing and held that in checking out each prior owner in the chain of title, one need not check out the prior owner to the present day, but may terminate his search with respect to that prior owner after he has found a conveyance out from that prior owner which leads to the next link in the chain of title. *Ayer* and *Morse* are thus poles apart with respect to their appreciation of the customs of conveyancers and the burdens of the title searcher.

House No. 1459 (1966), which was not passed, sought to repudiate the rule in the *Ayer* case. Interestingly enough, though, this bill would vest title in B, in the hypothetical previously posed, only upon B's recordation of his deed. Also, the bill is susceptible of being interpreted as conditioning B's ability to prevail upon his being without actual notice of A's deed at the time of the recordation of B's deed, rather than at the date of the delivery of the deed to B. In these two respects, the proposed bill introduces two novel recording concepts.\(^6\)

It should also be noted that, contrary to the existing recording statute,\(^7\) B would prevail under this bill even if he were a donee and had not paid valuable consideration.

The second major bill which failed to receive legislative approval was Senate No. 292 (1966). It would have established an "Abstract of Title" law, whereby once a title had been examined and approved as a good marketable title, a record of such report would be given to the new owner and the charge for title examination would be based only on the effort required to bring the title up to date from the prior examination. The proposed bill was very vague in terms of its language, scope, and sanctions. It did not indicate what sort of prior examinations would be deemed to have yielded a good marketable title or the sanctions intended in the event of noncompliance.

House No. 3366 (1966), which received legislative approval as Chapter 422 of the Acts of 1966, is of considerable interest to real estate brokers and developers in other states. It prohibits brokers from engaging in sales in the Commonwealth of realty located in a land subdivision development in another state which is the subject of promotional advertising in the Commonwealth, unless the owner or developer has submitted full particulars regarding such property to the Real Estate Board.

Also enacted was Chapter 574 of the Acts of 1966, providing for the recording of certain affidavits relating to the title to real estate. This measure, which becomes Section 5B of Chapter 183 of the General Laws, provides that an affidavit made by a person claiming to have personal knowledge of facts relevant to the title to realty may be recorded in the registry of deeds if it also contains a certificate by

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\(^5\) 140 Mass. 112, 2 N.E. 929 (1885).

\(^6\) See Powell, Note, 14 Calif. L. Rev. 482 (1926).

\(^7\) 4 American Law of Property §17.10 (Casner ed. 1952).
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an attorney that the facts stated in the affidavit are relevant to the question of title and will be of benefit and assistance in clarifying the chain of such title. It is interesting to note, however, that unlike General Laws, Chapter 183, Section 5A, this act does not specifically provide that such an affidavit is admissible in evidence in support of such title in a proceeding relating to such title. Under Section 5A, a statement of a person's marital status, kinship, or of the date of his birth or death, which relates or purports to relate to the title to land, may be filed for record and is admissible in evidence. Thus, it could be plausibly contended that the effect of the new section is limited merely to introducing a new aid for making titles more marketable, but that basic rules of evidence are not altered. In passing, it should be observed that the author has found no cases sanctioning the admissibility of affidavits under Section 5A in circumstances in which such evidence would not otherwise be admissible under the traditional rules of evidence.