Chapter 1: Property and Conveyancing

Cornelius J. Moynihan

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PART I

Private Law

CHAPTER 1

Property and Conveyancing

CORNELIUS J. MOYNIHAN

A. Real Property

§1.1. Landlord and tenant. The landlord-tenant relationship can range from that of a simple tenancy at will to a wonderfully complex structure of rights and duties created by an elaborate lease. During the 1955 Survey year the latter type of situation was illustrated in Ghoti Estates, Inc. v. Freda's Capri Restaurant, Inc.¹

The facts were as follows: In 1951 one Goggin and the defendant executed a written lease of certain restaurant property in Boston whereby the premises were leased to the defendant for ten years commencing January 1, 1952. The lessee convenanted to pay all water charges. Clause VIII of the lease gave the lessor a right to enter to terminate the lease on default of the lessee or on the appointment of a receiver of the lessee's property. This clause also contained a survival provision whereby on termination the lessee agreed to indemnify the lessor against loss of rent or damages. Clause IX provided for automatic termination of the lease without entry by the lessor on the filing of a bankruptcy or insolvency petition by the lessee and further stipulated that upon such termination the lessor would be entitled to damages in an amount equal to the reserved rent for the residue of the term less the fair rental value of the premises. The lease was accompanied by a "Security Agreement" which acknowledged the receipt from the lessee of $10,000 "as a further consideration for the lessor en-

CORNELIUS J. MOYNIHAN is Professor of Law at Boston College Law School. He is the author of A Preliminary Survey of the Law of Real Property (1940), and a contributing author of American Law of Property (Part 7, Community Property) (1952).


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tering into the lease” and as security for performance by the lessee of its covenants under the lease. This agreement provided that the deposit would be applied toward the payment of rent due during the last nine months of the term if the lessee had fully performed up to then but on default by the lessee the lessor was given the right to apply the deposit against damages suffered because of the lessee’s failure to perform.

On June 6, 1952, the lessor conveyed the reversion and assigned the lease to the plaintiff. The lessor gave the plaintiff an adjustment or credit towards the purchase price of $10,000, the amount of the security deposit. The lessee had not paid the installment of rent due June 1 and on June 9 filed a petition for an arrangement under Chapter XI of the Bankruptcy Act acknowledging its inability to pay its debts as they matured. The receiver appointed pursuant to the petition paid for use and occupation of the premises up to September 11, 1952. The defendant continued to occupy until January, 1953.

The plaintiff brought an action to recover for use and occupation of the premises from September 12 to November 3, 1952, and for water used on the premises during part of that time. The defendant filed a declaration in set-off seeking to recover the $10,000 security deposit. The trial judge directed a verdict for the plaintiff for the full amount claimed in its declaration and also a verdict for the plaintiff against the lessee in the claim in set-off. The Supreme Judicial Court upheld the action of the trial judge. As to the claim for use and occupation the Court held that the filing by the lessee of the petition for an arrangement was a breach which automatically terminated the lease and that the lessee’s continued occupancy was as tenant at sufferance. As to the declaration in set-off it held that the plaintiff could retain the security deposit until it had ascertained its damages for loss of rent during the remainder of the term.

The existence in the lease of a so-called ipso facto or automatic termination clause (Clause IX) in addition to the standard optional or re-entry clause (Clause VIII) enabled the Court to hold that the filing of the arrangement petition by the lessee terminated the lease without the normally required entry by the plaintiff.2 The Court was of the opinion that the plaintiff could avail itself of either or both clauses. Since the clauses provided alternative methods of termination it is clear that the plaintiff could use either, but having chosen not to exercise its right of re-entry it is far from clear that the plaintiff could avail itself of the damages provisions of that clause. Yet in discussing the plaintiff’s right to retain the security deposit the Court speaks of “a breach of paragraph VIII of the lease by the nonpayment of rent” 3

2 For the history of the ipso facto clause in relation to bankruptcy proceedings, see Oldden v. Tonto Realty Corp., 143 F.2d 915 (2d Cir. 1944). As to its nonutility under the present Bankruptcy Act, see Hall, Landlord and Tenant §§309, 310 (4th ed., Adams and Wadsworth, 1949).


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and of the plaintiff's right to elect under both paragraphs VIII and IX to seek damages at the end of the term. It is at least arguable that the plaintiff having elected to terminate under paragraph IX was confined to the damages provisions of that clause.4

The Court's denial of the lessee's right to a return of the security deposit was essentially based on the ground that the action was premature because the plaintiff at its election could wait until the end of the term when loss of rent for the remainder of the term could be more accurately determined. Neither Court nor counsel adverted to the basis of the plaintiff's liability to return the deposit. The plaintiff was not a party to the security agreement. Nor does it appear from the evidence that the plaintiff agreed with the lessor to assume the lessor's obligations on the agreement although perhaps an implied assumption could be found from the fact that the plaintiff was given a $10,000 credit towards the purchase price.5 But it would seem doubtful whether this would justify the lessee in maintaining an action at law against the plaintiff. Whether the lessor's obligations under a security agreement amount to a covenant running with the reversion is a point on which the courts are not in agreement.6

The question of the defendant's liability for water used during the period of occupancy as a tenant at sufferance was overshadowed by the larger issues in the case. The Court allowed recovery without discussion or citation of authority. Although the terms of the lease required the lessee to pay charges for the use of the water the occupancy of the defendant was no longer under the lease and it is difficult to find any contractual basis for imposition of liability on the defendant. It has been held that a tenant at will is not liable for water consumed in the absence of agreement or any custom in the locality for tenants to pay such bills.7

§1.2. Land use control: Zoning. A significant decision dealing with the substantive law of zoning was Burnham v. Board of Appeals of Gloucester.1 The case highlights the degree of flexibility in the control of land use that can be achieved by means of the device of the special exception as contrasted with the variance or with the zoning

4 The Court leaned heavily on the introductory language of Clause IX: "And for the more effectual securing to the Lessor of the rent and other payments herein provided . . . ."

5 In Reed v. Bristol County Realty Co., 250 Mass. 284, 145 N.E. 455 (1924), the security deposit was said to create a pledge. For a discussion of the different theories of the relationship between the parties arising from a security deposit, see 1 American Law of Property §3.73 (1952); and see Comment, Correlative Rights of Landlord and Tenant to Security Deposit, 43 Yale L.J. 307 (1933).


ordinance amendment effecting a change in the zone lines. In 1953 the city of Gloucester amended the zoning ordinance so as to include "motels" in the list of permissible uses in a single residence district and to require a permit from the board of appeals for the maintenance and operation of a motel. The effect of this amendment was to authorize the board of appeals to grant a permit for the construction and operation of a motel in any single residence district in the city subject to "conditions, regulations or limitations such as the Board may deem necessary to protect the community and the City. . . ." 2 The amendment prohibited the grant of a permit by the board "without considering the effects upon the neighborhood and the City at large."

After the enactment of this amendment the plaintiff applied for a permit to build and operate a motel on a parcel of land located in the Bass Rocks area of the high-class residential section of the city known as Eastern Point. The board, after observing all of the procedural requirements, granted the permit. On appeal to the Superior Court by adjacent landowners the trial judge held the amendment invalid and annulled the decision of the board. 3 The Supreme Judicial Court reversed this decree and upheld the validity of the amendment and the board's action thereunder. The Court conceded that the policy underlying the amended ordinance was one of debatable wisdom but refused to accept the argument that the city had exceeded the powers given it under the provisions of the enabling statute authorizing the grant of special permits. 4 Finally, the Court held that the amendment set up a sufficient standard to guide the board in granting or denying permits in view of the difficulty of laying down a more precise standard in circumstances that might involve unforeseeable factors.

The decision reflects the Court's willingness to allow a large measure of local autonomy to a municipality in working out in good faith a solution to a problem that essentially involves a balancing of the interests of property owners in a particular section as against the interests of the city as a whole, and the result reached is the more striking in light of the trial judge's findings. He found that the character of the Bass Rocks area and the surrounding territory had not changed

2 Record, p. 25.
3 The trial judge found and ruled that the permit issued by the board to the petitioner "limits the issuance and use as follows: 'To the petitioners and their immediate family and should any transfer of the property be made to any other person or corporation this permit at once becomes null and void.' That the decision of the Board in granting such a permit is arbitrary, capricious and unreasonable." It is not clear from this language whether the trial judge was ruling that the grant of a permit for a motel on the locus was arbitrary and unreasonable or that the grant of a permit burdened with a restraint on alienation was invalid. The Supreme Judicial Court apparently construed this ruling as invalidating the grant of the permit as arbitrary apart from the question of the propriety of the restriction. 1955 Mass. Adv. Sh. at 885, 128 N.E.2d at 774. The petitioner did not raise any question as to the power of the board to impose the restrictions.
since the time the original zoning ordinance had been enacted (1927); that the locus had no "special peculiarity or noteworthy characteristic which distinguishes it from other land in the area"; that the construction and operation of a motel in the area would radically change the residential character and cause an influx of transients and increase traffic on the narrow roads designed for a secluded area; and that the locus "is readily adaptable and best suited for the construction of residences for single families."

A provision in a zoning ordinance for special exceptions or, more accurately, use permits gives flexible control over unusual uses of land and buildings that cannot adequately be covered by specific regulations applicable to all situations. The location of institutional type buildings and structures of a public or quasi-public nature cannot well be predetermined when the lines of the zoning districts are drawn up and, therefore, uses for such purposes are frequently made the subject of a special exception. The variance with which the special exception use is sometimes confused, serves the different function of relieving the landowner from the application of the ordinance in limited situations on the ground of "substantial hardship." Although an ordinance providing for special exceptions confers on the board of appeals what in substance is a floating power to anchor a nonconforming type of structure in any use district it is not likely that the Court will allow an indiscriminate use of that power to make a shambles of an integrated zoning plan.

In two cases the Court reaffirmed the holding in the leading case of Pendergast v. Board of Appeals of Barnstable that normally the Superior Court cannot grant a variance which has been denied by the board of appeals. The procedural aspects of these cases as well as legislative enactments affecting zoning procedure are discussed in Section 13.2 infra.

§1.3. Land use control: Subdivision laws. The powers of planning boards with respect to subdivision control were clarified and strength-
ened by the decision in *Rettig v. Planning Board of Rowley.*\(^1\) In that case the Court construed G.L., c. 41, §81L (Subdivision Control Law) as requiring planning board approval of a development plan despite the existence on the land of private ways if such ways are inadequate.

The plaintiff landowner had submitted to the board a plan showing a division of the tract into fifteen lots having frontage on private ways one of which ways, at the time subdivision control became effective in the town, had a width of 10 feet, was in poor repair, and was impassable at times. The plaintiff asked for a determination by the board that approval of the plan was not required. The board decided that approval was required. On appeal to the Superior Court the trial judge ruled that the plan did not require approval “inasmuch as the ways in question . . . were all existing and adequate for access for vehicular traffic to the lots shown on said plan when the subdivision control law became effective (1951) in said Rowley.”\(^2\) The Supreme Judicial Court reversed the decree entered in accordance with this ruling. Without attempting to define the word “way” as used in Section 81L of the statute\(^8\) the Court held that the 10-foot way was not in existence in 1951 as a way “in any practical sense” and was not a way “adequate for access for vehicular traffic.”

The decision would seem to put at rest the argument that the existence of any ancient rutted way on the tract removes the land from subdivision control.\(^4\)

On the legislative scene during the 1955 Survey year, several amendments to the Subdivision Control Law were enacted on the recommendation of the Special Commission on Planning, Zoning and Subdivision Control.\(^5\) The most important of these changes brings industrial land under subdivision control.\(^6\) Other amendments require planning boards to hold a public hearing before the adoption of rules and regulations;\(^7\) authorize such boards to delegate to a designated person the power to endorse, on a plan found by the board not to require approval, a statement that approval is not required;\(^8\) and require that appeals from decisions of planning boards to the Superior Court be advanced for speedy trial over other civil proceedings.\(^9\)


3 Section 81L defines subdivision as “the division of a tract of land into two or more lots in such manner as to require provision for one or more new ways, not in existence when the subdivision control law became effective in the city or town in which such land lies, to furnish access for vehicular traffic to one or more of such lots . . . .”


7 Id., c. 370.

8 Id., c. 326.

9 Id., c. 348.
§1.4. Statute of Frauds: Part performance. The Statute of Frauds in the application to contracts to convey land came before the Court in only one case but the opinion therein may indicate a tendency to relax the fairly rigid Massachusetts doctrine with respect to the elements of part performance sufficient to take a case out of the Statute. In *Fisher v. MacDonald*, the defendant in 1946 orally agreed to sell to the plaintiff and the plaintiff agreed to buy a house in Attleboro for $4500 to be paid at the rate of $22 a month without interest. The plaintiff was to pay the taxes, water bills, and the insurance and was to keep the house in good repair. It was agreed that work which the plaintiff would do about the defendant's premises, adjacent to the house which was the subject of the agreement, would help pay for the house. After the oral agreement the plaintiff moved into possession of the house and continued in possession up to the time suit for specific performance was brought. In addition to paying $22 per month the plaintiff "renovated" the inside of the house and made minor repairs on it. The plaintiff also did work on the house owned and occupied by the defendant and performed other services for him which the master found was "in accordance with the agreement" and had a value of $1231.25. In January, 1950, the defendant informed the plaintiff that he would not sell for less than $10,000. The plaintiff offered to pay the balance due on the original purchase price but the defendant refused to take it.

The Court affirmed a decree granting specific performance. In answer to the defendant's reliance on the statute (G.L., c. 259, §1) the Court stated: "But the plaintiff was put into possession and has furnished part of the consideration in money and services. That is sufficient to enable him to invoke the doctrine of part performance in aid of his suit for specific performance of the oral contract." This statement is none too clear an exposition of what the Court thought to be the controlling principle. If it means that possession and part payment by the buyer without more are sufficient to bar the defense of the Statute of Frauds in a suit for specific performance of an oral contract for the sale of land the holding modifies the prior Massachusetts view on the point. In numerous cases it has been held that unless the buyer has changed his position to such an extent that a decree for specific performance is necessary to prevent an unjust and unconscientious injury he will be denied relief. Part payment of the purchase price, taking possession and the making of minor improvements are not sufficient, taken singly or collectively, to overrule the plea of the

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2 The master, to whom the case was referred, made no finding as to the fair rental value of the house, nor as to the value of the renovation and repairs.


Statute. The inflexibility of this rule, sometimes termed the Massachusetts rule, has served the function of preventing a gradual erosion of the Statute.

It is more probable, however, that the Court's statement was intended to mean that possession and part payment together with other factors in the case justified the granting of equitable relief. Additional factors that may have had persuasive weight were the fact that the defendant induced the plaintiff to enter into the agreement and to vacate the apartment which he occupied, the fact that an unsigned memorandum of the agreement was drawn up by the defendant and given to the plaintiff, and the length of time the plaintiff occupied under the oral agreement. The Court's reliance on Andrews v. Charon may indicate an intent to adopt the approach disclosed in that case where the Court summed up by saying, "Without relying on any particular fact alone but considering the effect of all the facts in combination we conclude that an unjust and unconscientious injury and loss will result therefrom if relief is denied." When the ultimate criterion for relief is so flexible each case must be decided on its own facts and the line of demarcation will not always be an unwavering one.

B. CONVEYANCING

§1.5. Vendor and purchaser: Misrepresentation of facts of record. The marked tendency of the Court in recent years to narrow the area wherein the seller of land may with impunity make false representations to the buyer was highlighted in the 1955 Survey year by the decision in Yorke v. Taylor. In that case the vendor had innocently misrepresented to the purchaser, during the course of negotiations for the sale, the assessed valuation of the property. In a suit for rescission by the buyer the Court held that it was no defense that the buyer could have ascertained the falsity of the representation by the exercise of due diligence. Refusing to draw a distinction with respect to the plain-tenant's duty to investigate between a knowingly false representation and one made innocently, the Court adopted the rule of the Restatement on Torts that the recipient of a misrepresentation of fact is justified in

7 289 Mass. at 7, 193 N.E. at 740.

§1.5. 1 382 Mass. 368, 124 N.E.2d 912 (1955).
2 3 Restatement of Torts §540, particularly Comment c, which specifically states that the rule set forth in the section is applicable "even though the fact which is falsely represented is required to be recorded."
relying on its truth although he might have discovered the falsity had he made an investigation.

The case is of special significance to the conveyancing bar in that the misrepresentation related to a matter of public record. For a detailed examination of the case, see Section 3.1 infra.

§1.6. Vendor and purchaser: Right of buyer to recover deposit. In three cases the Court was called upon to consider the right of a buyer to recover a deposit paid to the seller on the execution of a purchase and sale agreement. In *Livoli v. Stoneman*¹ the agreement provided that it was "subject to the subdivision plan being approved by the Planning Board, for a development." It also contained the usual clause for refund of any payments made if the sellers "shall be unable to give title or to make conveyance as above stipulated . . . ." The parties understood that the buyer intended to subdivide the land for a housing development. After the execution of the agreement the buyer submitted to the planning board a plan showing a subdivision of the locus into 204 lots and a layout of streets. The planning board refused to approve the plan because the town water commissioners would not make water available to the development unless the buyer agreed to pay the estimated cost of $200,000.² This the buyer was unwilling to do. The sale price of the property was $96,750. The Court held that the buyer was entitled to the return of his deposit because "without the approval of the plan as provided in the agreement, the defendants were unable to make conveyance as stipulated . . . ."³ Although the result reached would be the same, it would seem preferable to base the buyer's right to a refund on the clause in the agreement making the buyer's obligation subject to planning board approval of the subdivision plan. That clause could properly be construed as justifying the buyer's rescission on nonapproval. If the sellers' obligation to convey includes a duty to convey with planning board approval of the subdivision they would be liable for damages for breach in the absence of the usual escape clause providing for cessation of obligations in the event the sellers are unable to convey as stipulated. It is not clear from the opinion what the court deemed to be the duty of the buyer with respect to obtaining approval. At one point it is stated that the buyer "was under no obligation to procure such approval at any cost."⁴ But the Court also held that a requested ruling by the defendants that the agreement "means that the plaintiff was to take steps necessary to procure said approval" was erroneous "as matter of law."⁴ On the whole it is probable that the Court

² As to the powers of a planning board in this respect, see G.L., c. 41, §§81Q, 81U.
⁴ 1955 Mass. Adv. Sh. at 377, 125 N.E.2d at 785. The Court cited as authority *Connor v. Rockwood*, 320 Mass. 360, 69 N.E.2d 454 (1946). In that case the buy-and-sell agreement provided that performance by the seller was to be subject to the approval of the conveyance by a third person. The seller was unable to obtain the specified approval. The buyer was denied specific performance, the Court stating that the
meant that the buyer's obligation was no greater than a duty to take reasonable measures to obtain the specified approval. The trial judge had specifically found that the plaintiff had done everything "which was reasonably necessary to obtain approval of the subdivision plan." In *Reilly v. Whiting*, also decided during the 1955 Survey year, the buyer was denied recovery of his deposit because, despite the seller's alleged inability to tender a marketable title, he failed to bring his action within the one-year period applicable to actions on contracts made by executors and administrators. The defendant, executrix and sole beneficiary under the will of her late husband, executed the contract to sell certain real and personal property, forming part of the assets of the estate, as executrix and individually. The agreement provided that the realty was to be conveyed "by a good and sufficient executrix's deed." The will conferred on the executrix a power to sell the real estate "at public or private sale in her discretion . . . ."

At the date finally set for passing of papers the defendant had obtained no license to sell from the Probate Court, had filed no inventory and had not paid any inheritance tax. The seller refused to accept the proffered deed but did not sue for a refund until more than a year thereafter. The Court held that the short statute of limitations was applicable and that, since the defendant was individually liable on the contract, the addition of the words "and individually" did not affect the result. Other than remarking that no license to sell from the Probate Court was necessary the Court refrained from passing on the other alleged defects in the seller's title.

The third case in this series, *Holiver v. Department of Public Works*, involved an installment land contract. In 1941 the Commonwealth through the Department of Public Works contracted to sell a parcel of land to one McGrath for $100,000 payable $6500 at once and the balance in eleven annual installments of $8500 each with interest. The contract gave the buyer the right to take possession immediately and to construct buildings on the land. Conveyance was to be made on the completion of payments. Time was stated to be of the essence. The contract provided that on failure of the buyer to make the stipulated payments the Commonwealth could, after giving ten days' notice

seller was under no duty to procure the third person's consent. It would seem advisable from the seller's standpoint where the agreement states that it is subject to planning board approval of an intended subdivision that the agreement further provide expressly that the buyer will take all reasonable means to procure such approval.

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7 G.L., c. 260, §11.
8 The seller's contention on this point was that the alleged defects constituted "encumbrances of record" and that the agreement called for a deed conveying good title subject to such encumbrances. Defendant's Brief, pp. 2-3. Cf. *Oliver v. Poulos*, 312 Mass. 188, 44 N.E.2d 1 (1942); *Dyer v. Scott*, 253 Mass. 430, 149 N.E. 146 (1925).
of default, treat the agreement as void and retain any payments made as liquidated damages.\textsuperscript{10} The buyer made the initial payment of $6500, but no further payments were made. By subsequent agreement in 1943 the buyer’s obligation to make annual payments was suspended during the national emergency subject to the right of the seller, if it should find that building materials were available, to give notice to the buyer that the agreement “shall be in effect” and annual payments should be resumed upon the first day of the following May. The buyer assigned his rights under the agreement, as he was authorized to do, and the plaintiff eventually became the assignee. In November, 1948, the buyer was notified that payments must be resumed. No further payments having been made the buyer was finally given notice of default in May, 1953, and in June, 1953, notice was given to the buyer and all assignees that the Commonwealth declared the agreement null and void.

The plaintiff filed suit for declaratory judgment, alleging that he was ready, able, and willing to comply with the terms of the agreement. The trial judge entered a decree declaring that the agreement was null and void and that the $6500 down payment “be forfeited to the Commonwealth as liquidated damages, as provided in the contract.” \textsuperscript{11} The Court affirmed this decree. The plaintiff in substance sought specific performance. He based his case primarily on the invalidity of the notice to resume payments and of the notice of default. The Court’s opinion in turn deals exclusively with those points. The Court apparently assumed that the contract provisions covering termination of the agreement on default by the buyer and retention of payments were conclusive of the rights of the parties. A frontal attack by the plaintiff on the validity of the clause allowing the seller to treat the agreement as null and void on the buyer’s default would probably have failed in the absence of a tender by the plaintiff of the unpaid balance of the purchase price. The plaintiff’s default would at least deprive him of the right to continue to pay in annual installments, a right which he sought in substance in his bill. Had the plaintiff made a tender of the unpaid balance his position would arguably have been that of an equitable mortgagor seeking to enforce an equity of redemption against a forfeiture.\textsuperscript{12} It is questionable in the light of prior decisions\textsuperscript{13} whether relief would have been granted to the plaintiff on that ground but the Court might have been persuaded to re-examine the problem. So also with respect to the usual clause in a buy-and-sell agreement giving the seller the right to retain the buyer’s

\textsuperscript{10} The contract is set forth in the plaintiff’s brief, pp. 2-4.
\textsuperscript{11} Record, p. 34.
\textsuperscript{12} 2 Restatement of Contracts §375; 3 Williston, Contracts §791 (rev. ed. 1936); 5 Corbin, Contracts §§1127-1135 (1951).
payments as "liquidated damages," the decisions mechanically denying the buyer any recovery do not necessarily prevent the Court from considering in an appropriate case whether the clause is in reality an unenforceable penalty.

§1.7. Tenancy by the entirety. A decision having practical, if not theoretical, importance for conveyancers was *Hale v. Hale.* In that case the Court upheld the effectiveness of a deed by a wife conveying directly to her husband her interest in realty held by them as tenants by the entirety. The Court sensibly construed the statute (G.L., c. 209, §3) as authorizing a direct conveyance of his or her interest in the estate by one spouse to the other despite the fact that the statute authorizes conveyances between husband and wife "to the same extent as if they were sole" and this phrase was previously held to render G.L., c. 209, §1 (authorizing a married woman to dispose of her property "in the same manner as if she were sole") inapplicable to tenancies by the entirety. The device of conveyance through a straw is now made unnecessary.

In *Sztramski v. Spinale* the female tenant by the entirety was held liable with her husband on an oral contract to have a house built on their land although the negotiations with the building contractor were carried on by the husband alone. Although giving effect to the familiar rule that the husband has the right, during the joint lives, to exclusive possession and control of the property, the Court held that the trial judge was warranted in finding that the husband was acting as agent for his wife as well as on his own behalf in making the contract. Proof of agency rested primarily on inferences that could be drawn from the evidence that the husband was acting also on her behalf with her knowledge. The Court pointed out that her interest in the property was an important factor "in the determination of her knowledge of and acquiescence in the acts of her husband."

§1.8. Conveyance on condition: A new remedy in rescission. It is not unusual for an elderly landowner, harassed by the anxieties of


Skillful cross-examination aided the plaintiff's case. The husband was asked: "Well, it was all right with her as far as you knew to talk for the both of you, for you and for her?" He answered: "To build a house." 1955 Mass. Adv. Sh at 412, 126 N.E.2d at 121.

old age, to make a conveyance of his or her property on condition that, or on an agreement that, the grantee furnish support or necessary care to the grantor for life. Although a trust would in many situations be a more desirable device, conveyances for such purposes are still frequently made and produce a fair share of litigation. One such conveyance came before the Court in Collins v. Keefe.\(^1\) The plaintiff, an elderly woman, and her husband (since deceased) owned a duplex house as tenants by the entirety. They conveyed this property to the defendants Keefe by a deed which recited: “this conveyance is made upon the following express conditions: (1) That the grantors shall have the right to occupy, rent free, the apartment in which they now reside, for and during the terms of their natural lives. (2) The grantees shall furnish such nursing and other services as may be reasonably required by the grantors.”\(^2\) The grantees subsequently mortgaged the property to the defendant Cohen who had notice of the provisions in the deed. On failure of the grantees to furnish required nursing care the surviving grantor brought a bill in equity seeking cancellation of the deed and mortgage and a reconveyance of the property. The Court affirmed a decree adjudging both the deed and mortgage “null and void” and ordering a reconveyance.

The Court construed the phrase “on express condition” as having the effect of making the conveyance one on condition subsequent. The Court recognized that the ultimate question is one of the grantors’ intent but in ascertaining that intent relied almost exclusively on the form of the language. Although the Massachusetts courts traditionally have leaned more heavily than other courts on the use in the deed of the word “condition” and other words of similar import in concluding that an estate on condition subsequent was created,\(^3\) the cases recognize that the deed as a whole may warrant a different interpretation.\(^4\) The problem of construction is not foreclosed by the use of a set formula although weight is to be given to the accepted meaning of the words used. Words of condition may also create a contractual obligation and could be so construed in Collins v. Keefe, if necessary.\(^5\) In fact, the Court seemed to construe the first clause of the “condition” as reserving in the grantors a life estate in the half of the house they occupied.

If the deed created an estate on condition subsequent that estate

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\(^2\) Record, p. 7.

\(^3\) Compare Gray v. Blanchard, 8 Pick. 283 (Mass. 1829), with Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889); and see Langley v. Chapin, 134 Mass. 82, 86 (1883); Guild v. Richards, 16 Gray 309, 322 (Mass. 1860).


\(^5\) Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp., n. 4, supra.
continued to exist despite the breach of the condition. 6 Normally, an entry by the grantor or an action to recover the property is necessary to terminate the grantee's estate. 7 In Collins v. Keefe the Court is in effect allowing a bill in equity as a substitute for a writ of entry. The purported basis of equitable jurisdiction was the removal of a cloud on title. Since the mortgage given by the grantees to the defendant Cohen was outstanding and constituted a cloud on the title, relief in equity might be justified on the basis of avoiding multiplicity of suits. However, the Court in its opinion also seems to allow the equitable remedy on the theory of specific restitution. 8 Insofar as the decision rests on a theory of rescission and restitution it indicates the availability of a new remedy to a grantor who conveys in return for an agreement to furnish support. It would seem that this remedy would lie even though the conveyance created an absolute fee rather than one on condition.

C. PERSONAL PROPERTY

§1.9. Gifts: Requirement of delivery. The unhappy consequences of attempting to use the device of a parol gift as a substitute for a will were dramatically illustrated in Kobrosky v. Crystal. 1 In that case a devoted husband's attempt to make a gift of $120,000 in cash to his wife failed for lack of delivery. The money was in the safe of an office of a corporation controlled by the husband. The key to this safe was in a small envelope which bore the wife's name and this envelope was contained in a second safe located in a bedroom occupied by the couple. The husband alone knew the combination to the bedroom safe. He tried to teach his wife the combination but she was unable to master it. Statements by the donor to the donee and others that the money was the wife's were held insufficient with the other facts to sustain the probate judge's findings of a valid gift.

Subsequent family squabbles made an unusually thorough shambles of the estate. After the donor's death the money was turned over to the wife and part of it was later appropriated by one of the adult children, without the wife's consent. A suit to recover the money


7 See G.L., c. 184, §19; c. 237, §4; Dyer v. Siano, n. 6, supra.

8 The Court cited Rayner v. McCabe, 319 Mass. 311, 65 N.E.2d 417 (1946), a case in which the right of a grantor in a conveyance for support to specific restitution was discussed but not decided. It also cited 5 Williston, Contracts §1456 (rev. ed. 1957) and 5 Corbin, Contracts §1120 (1951). Both of these authors take the view that the grantor is entitled to restitution on failure to perform by the grantee. It is noteworthy that in Collins v. Keefe the decree ordered a reconveyance by the grantees to the grantor. Cf. Young v. Young, 251 Mass. 218, 146 N.E. 574 (1925). See 2 Restatement of Contracts §354.

§1.9. 1 332 Mass. 452, 125 N.E.2d 385 (1955).
failed. Although normally a person in possession of personal property under a claim of title may maintain an action against a third person for conversion of, or damage to, the property, the Court held that this rule is inapplicable to actions brought to recover the personal property of a deceased person. The wife's position with respect to the money was, in the Court's view, that of an executor de son tort and, therefore, she was unable on public policy grounds to maintain the suit.