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Chapter 1: Property and Conveyancing

Cornelius J. Moynihan

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CHAPTER 1
Property and Conveyancing

CORNELIUS J. MOYNIHAN

A. REAL PROPERTY

§1.1. Landlord and tenant. The importance of careful draftsmanship of a clause in a lease dealing with the contingency of a taking of all or a portion of the premises by eminent domain was strikingly emphasized in Newman v. Commonwealth. In that case the lessee, Shell Oil Company, in 1952 entered into a lease for twenty and one-half years of a parcel of land to be used as an automobile service station. Pursuant to the terms of the lease, Shell constructed on the premises a building and improvements which became a part of the realty. Shell reserved the right to remove these improvements at the termination of the tenancy. On November 2, 1954, a portion of the premises, amounting to 3512 square feet out of a total area of 14,613 square feet, was taken by the Commonwealth for highway purposes. The land so taken contained improvements erected by Shell consisting of pumps, islands, underground tanks, entrances, poles and signs.

A clause of the lease recited:

If, without Shell’s fault, the operation on the premises of an automobile service station, or the use of the premises therefor, is prevented, limited or impaired by any act or omission of any govern-

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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mental authority . . . ; or if such operation or use is at any time impaired or affected by the closing, relocation or alteration of any street adjoining the premises . . . ; or if all or any part of the premises is condemned for public or quasi-public use: Shell may terminate this lease by giving the Lessor at least ninety (90) days' notice.

In addition, Shell was granted the privilege of terminating the lease "at any time for any reason" by giving the lessor ninety days' written notice and on the payment by Shell to the lessor of $20,000 "as liquidated damages."

After the taking Shell, pursuant to the above clause, sent the assignees of the lessor (hereinafter called the lessor) notice of termination. The total damage to all interests resulting from the taking was $70,000. The lessor brought a petition for assessment of damages in which Shell intervened. It was agreed that if Shell was entitled to any apportionment of the award for damage to either its leasehold interest or its improvements judgment was to be entered in its favor against the Commonwealth for $25,000, and the remainder of the $70,000 award was to be paid to the lessor. The trial judge reported the case without decision.

The Supreme Judicial Court held that Shell had no right to a share in the condemnation award either for damage to its leasehold or to its improvements. Pointing out that the case was one of first impression on the question of the effect of a termination of a lease by a lessee upon a taking, the Court concluded that when the lessee exercised its election the lease was "gone completely with the burdens and benefits alike." In reaching this conclusion the Court relied by way of analogy upon cases holding that the lessee's right to damages is cut off when the lessor, pursuant to a clause in the lease giving him that right, exercises an election to terminate in the event of a taking or when there is a clause providing for automatic termination on such a contingency. The obvious distinction between such cases and Newman is that here the termination privilege was reserved exclusively to the lessee and was for the lessee's benefit. But, as the Court pointed out, conceding this to be so, there still remains the question of the scope of that benefit. Without the termination privilege the lessee would have been obligated to pay the full rent reserved with no abatement by reason of the partial taking. By exercising its termination option Shell relieved itself of that burden. Whether it thereby waived its right to damages for the taking poses a problem of considerable diffi-

2 336 Mass. at 447, 146 N.E.2d at 488.
3 Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115, 57 N.E. 214 (1900). In Sparrow Chisholm Co. v. Boston, 327 Mass. 64, 97 N.E.2d 172 (1951), the lease gave both the lessor and lessee an election to terminate in the event of a total or partial taking. Upon the taking the lessor elected to terminate.
The fact that the lease also provided that Shell could terminate "at any time for any reason" on payment to the lessor of $20,000 liquidated damages undoubtedly was of persuasive influence, but it is probable that the Court would have reached the same result, although perhaps less justifiably, on the basis of prior cases dealing with the effect of termination by the lessor. Properly, the problem is one of draftsman ship, not one of litigation. As the Court pointedly remarked: "All uncertainty could have been avoided by a more explicit provision in the lease."

The Court's further holding that the lessee was not entitled to damages for the improvements which it had erected and which it had the right, as against the lessor, to remove was based upon the ground that injuries to improvements are not compensable as a separate item of damages but only in so far as they enhance the value of the estate. Since the lessee's estate had been extinguished by its election to terminate, its right to compensation for the improvements was also gone. Again, the inadequacy of the termination clause of the lease was fatal to the lessee's claim.

In another case of first impression, Gordon v. Sales, the Court held that a landlord could recover in an action for use and occupancy, against a holdover tenant, the fair rental value of the premises when such value exceeded the rent fixed by the terms of the prior tenancy. The prior tenancy at will had been terminated by statutory notice to quit given by the landlord, but the tenant continued to occupy under a stay of execution granted in the summary process action. The Court expressly left open the question of whether the tenant remaining in possession after the termination of the tenancy could be held liable for the old rent when that rent exceeded the fair rental value.

In the area of tort liability, the Court was for the first time called upon to consider the duty owed by the lessor of a shopping center to a customer of one of the lessee stores located in the center. The case,  

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6 336 Mass. 444, 446, 146 N.E.2d 485, 487.
9 The notice to quit was of doubtful validity but the question of its effectiveness was not before the Court because the judgment in the prior summary process proceedings was res judicata. The notice read: "You are hereby notified that your tenancy of the premises at 24 Hanover Circle [Lynn] is terminated as of January 30, 1956. Should you desire to remain a tenant, after said date the rent for the premises will be forty (40) dollars per week." Cf. Maguire v. Haddad, 325 Mass. 590, 91 N.E.2d 769 (1940).

During the period that the defendant occupied the premises after the judgment in the summary process action he paid rent weekly at the former rate by check. The landlord had these checks certified and was holding them at the time of trial. The Court held that the certification of the checks did not require the trial judge to rule that a new tenancy at the former rent had been created.
Underhill v. Shactman,\textsuperscript{10} involved the well-known Chestnut Hill Shopping Center located on the Worcester Turnpike in Brookline and Newton. The plaintiff, while visiting the center in order to shop at Filene's,\textsuperscript{11} one of the numerous stores located there, sustained personal injuries owing to an allegedly defective condition of the common parking area, control of which was retained by the lessors. In her action against both the lessors and Filene's, verdicts were directed for the defendants. The verdict in favor of Filene's was allowed to stand, but the direction of a verdict for the lessors was reversed on the ground that it could be found "from the nature of the business and the manner in which it was conducted that the trustees [the lessors] had for their own purposes extended an invitation to the public to visit the center."\textsuperscript{12} Because of this invitation the lessors' duty to the plaintiff was to use reasonable care to keep the common approaches in a reasonably safe condition for her use and not merely a duty to exercise reasonable care to keep them in the same condition they were in, or appeared to be in, at the time of the lease to Filene's.\textsuperscript{13}

In reaching the conclusion that there was an invitation from the lessors to the public, the Court relied upon such factors as the location of the shopping center with its many types of stores in full view of a heavily traveled highway, the maintenance of a sign directing attention to the center and the interest of the lessors in attracting customers because of the holding by the tenants on a percentage lease basis. The decision is clearly sound but it suggests the question of whether the Court will be willing to apply the same rule to customers of commercial tenants in an urban building which by reason of location and design attracts the public. The case may mark a departure from the prior decisions\textsuperscript{14} in its recognition of the economic interest of the landlord in the patronage of his tenants by the public.

\section{1.2. Statute of Frauds: Effect of change of position by promisee.}
The willingness of the Supreme Judicial Court to find a basis for estoppel against a defendant setting up the statute of frauds as a defense in order to prevent an exceptionally unfair result is evidenced in the decision of Orlando v. Ottaviani.\textsuperscript{1} The plaintiffs, husband and

\textsuperscript{10} 1958 Mass. Adv. Sh. 1045, 151 N.E.2d 287. This case is also discussed in \S\textsuperscript{3.5} infra.

\textsuperscript{11} Actually, Federated Department Stores, Inc., doing business as Filene's.


\textsuperscript{13} The condition of the parking area where the plaintiff was injured was apparently the same at the time of the injury as it was at the time of the letting to Filene's. In the absence of an invitation to the plaintiff from the lessor there could have been no recovery under the Massachusetts rule. See, e.g., Fenno v. Roberts, 327 Mass. 305, 98 N.E.2d 611 (1951); Sneckner v. Feingold, 314 Mass. 613, 51 N.E.2d 118 (1943).


\section{1.2. 1 1958 Mass. Adv. Sh. 405, 148 N.E.2d 373. For further comment on this case, see \S\textsuperscript{4.3} infra.}
wife, owned a parcel of land and adjacent to it was a vacant lot owned by one Fay. Fay had orally promised the plaintiffs that before selling the vacant lot he would give them the right of first refusal at a specified price. Thereafter the defendant Ottaviani approached Fay about buying the lot and was told that Fay would give the plaintiffs the first opportunity to buy. After discussing the matter with the plaintiffs, who expressed an intention to buy, the defendant Ottaviani orally promised the plaintiffs that if they would allow him to purchase the vacant lot he would convey to them a fifteen foot strip of it adjacent to their land. The plaintiffs had informed him that they were especially interested in this strip. Relying upon this promise the plaintiffs refrained from buying the vacant lot and notified Fay of their intention not to buy. Fay contracted to sell to the defendant Ottaviani who later caused it to be conveyed to the other defendants, his daughter and son.

The Court, in granting specific performance of the contract to convey the fifteen foot strip, held that the defendants were estopped to set up the statute of frauds because of the plaintiffs' part performance of, and change of position in reliance upon, the contract. By labeling the conduct of the defendant Ottaviani as amounting to "fraud" the Court was able to treat the co-defendants to whom the land was gratuitously conveyed as holding the fifteen foot strip in constructive trust for the plaintiffs. Despite the erosive effect upon the statute of decisions granting equitable relief in situations of this kind, it may be noted that it was by means of the oral agreement that the defendants were enabled to acquire their interests in the land. The decision falls within the principles applied in prior cases.2

§1.3. Adverse possession: Intent as affected by mistake in boundary line. When an owner of a lot by mistake encloses a strip or portion of an adjacent lot within an enclosure intended to mark off his own lot, and thereafter openly and notoriously possesses the entire enclosed area for the period of the statute of limitations, the question arises whether his possession has been "adverse" so as to extinguish the title of the adjacent owner to the strip or portion inadvertently enclosed. The majority of courts, including Massachusetts, have held that the objective intent of the possessor as manifested by his conduct governs, and not his subjective intent to possess only the land included in his deed.1 The innocent adverse possessor, therefore, prevails over the original owner of the disputed strip.2


§1.3. 1 In Bond v. O'Gara, 177 Mass. 139, 143, 58 N.E. 275, 276 (1900), Holmes, C.J., stated: "It is true, of course, that a man's belief may be immaterial as such. Probably, although the courts have not been unanimous upon the point, he will not be the less a disseisor or be prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. His claim is not limited by his belief. Or, to put it in another way, the
A variant of this problem arose in *Shoer v. Daffe.* Having enclosed, apparently by mistake, a portion of his neighbor's land within a privet hedge encompassing his lot, the original adverse possessor conveyed the lot to his wife who mortgaged it to a bank. The bank later foreclosed, bought in at the foreclosure sale, and thereafter leased the lot to successive tenants all of whom occupied and used the area enclosed by the privet hedge. The bank eventually sold the lot to the plaintiff's predecessor in title. The plaintiff and his predecessor occupants of the lot were in actual possession of the entire enclosed area for thirty-three years. The plaintiff brought a bill to establish his ownership of the portion of land originally abstracted from the adjacent lot now owned by the defendant. The master to whom the case was referred made no explicit finding as to the intention of the bank to claim title to the disputed area, but found "on all the evidence" that the plaintiff by reason of the use and cultivation of the entire area by himself and his predecessors had acquired title to the area by adverse possession. In holding for the plaintiff the Supreme Judicial Court stated "that the master could fairly infer that when the bank, following the occupancy of Stanley [the original adverse possessor], delivered possession of the property to its tenant, it evidenced a claim of title to all of the land which the tenant was expected to take, namely that which had been occupied by Stanley within the bounds defined by the hedge." Thus, the critical question of fact as to the intent of the bank with respect to occupancy by the tenant of the locus was left to inference instead of being made the subject of an express finding by the master. The result reached in the case is the opposite of that in *Holmes v. Johnson,* a case involving a similar fact situation, but in *Holmes* the master expressly found that the bank after its foreclosure claimed neither title nor possession to the disputed area occupied by its tenant. A comparison of the two decisions emphasizes the point that cases of this type are won or lost at the trial level.

§1.4. Easements: Creation by implied reservation. Decisions in recent years have indicated an increased readiness on the part of the Supreme Judicial Court to imply the creation of an easement upon the severance of the ownership of one or more parcels of land. This direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed . . . ."

And see 3 American Law of Property §15.5 (Casner ed. 1952).


tendency may be in part attributable to a change in the degree of necessity for the easement that must be shown by the person claiming it. All that is now required in this respect is that the claimant show that the easement is reasonably necessary for the enjoyment of the land conveyed or retained.2 Traditionally, it has been said that it is more difficult to imply an easement by reservation than by grant because the language of the deed is to be construed most strongly against the grantor,3 but even this distinction seems to have weakened in the recent case of Perodeau v. O'Connor.4 A majority of the Court held that a grantor, owner of two adjacent lots, had retained by implied reservation an easement of a right of way over the granted lot extending from the front to the rear of the lot so as to provide access to a garage in the rear. The claimed right of way extended along the common boundary line of both lots and was evidenced at the time of the conveyance only by tire marks on the lawn running from the street to the garage on the rear of the granted lot. The granted lot was vacant except for this garage which was moved within a month after the sale onto the lot retained by the grantor. Shortly after the conveyance both parties surfaced and curbed a driveway over the alleged right of way and used it in common for many years until by mesne conveyances the plaintiffs acquired the retained lot and the defendants bought the granted lot. This driveway provided the grantor with the only available means of access to the garage.

Emphasizing that the intention of the parties to the deed was the controlling factor the majority of the Court concluded from the facts that the parties intended that the grantor retain an easement of right of way. In reaching this conclusion the Court stated that the moving of the garage and the work on the driveway done by both grantor and grantee "presumably were based on arrangements made in connection with the conveyance." 5 Arguably, the conduct of the parties after the conveyance was equally consistent with an oral license from the grantee to the grantor. Although the claimant of an easement by implication existence would be apparent from an inspection of the premises. Whether in the absence of actual or constructive notice an easement would be extinguished on sale of the servient tenement to a purchaser for value was left open in Cummings v. Franco, 335 Mass. 639, 141 N.E.2d 514 (1957). See 2 American Law of Property §§8.36 (Casner ed. 1952).


3 Krinsky v. Hoffman, 326 Mass. 683, 95 N.E.2d 172 (1951); 5 Restatement of Property §476, Comment c.


5 336 Mass. at 475, 146 N.E.2d at 514. The informality of the arrangements between the grantor and the grantee may be attributable to the fact that at the time of the conveyance the grantee was the prospective son-in-law of the grantor and shortly after the conveyance the grantee erected a house on his lot, married the grantor's daughter and with his wife occupied the premises for many years. Record, pp. 43, 44. This relationship between the parties to the conveyance makes more difficult the ascertainment of their intention with respect to the driveway.
has the burden of proof. The Court's inference may have given the claimant the benefit of an unresolved doubt.

B. CONVEYANCING

§1.5. Vendor and purchaser: Right of buyer to recover deposit. The attempt of a buyer under a purchase and sale agreement to recover his deposit on the asserted basis of a defect in the seller's title is frequently resisted on the ground that the buyer had lost his right of action by reason of conduct amounting to waiver or estoppel. The buyer, for instance, may have originally given as his reason for refusal to perform his financial inability to complete the transaction. The buyer's refusal on such ground has been held or said to excuse the seller from performance despite the existence of an encumbrance on the title. The nature of the encumbrance with respect to removability by the seller has not been considered in some of the decisions as determinative of the question of waiver by the buyer. But in the case of Siegal v. Shaw the Supreme Judicial Court drew a clear-cut distinction between a situation in which the defect in the seller's title is an encumbrance that can be removed and one in which it is irremovable or "almost certainly irremovable." In the latter situation, the Court held, evidence that the buyer failed to perform because financially unable and that he at no time specified the encumbrance as an excuse for non-performance does not permit a finding of waiver or estoppel. The purchase and sale agreement in the case required the seller to convey "a good and clear record and marketable title . . . free from encumbrances." The premises contracted to be sold were subject to a municipal sewer easement which, it could be found, made the land more valuable for residential development.


2 See cases cited in note 1 supra. Compare Schilling v. Levin, 328 Mass. 2, 101 N.E.2d 360 (1951) (seller's failure to discharge outstanding mortgage found to be due to buyer's repudiation); Rubenstein v. Hershorn, 259 Mass. 288, 156 N.E. 251 (1927) (no reliance by seller on buyer's refusal to perform for reasons other than defective title; buyer allowed to recover deposit).


4 Attached to and incorporated in the agreement was a plan of the locus. This plan bore the endorsement of an engineer and a 1938 date. It showed the location on the locus of a sewer and drain. The Court held that the plan did not show the existence of a present easement as distinguished from a 1938 proposal for a sewer line which may never have been carried forward into an easement or a constructed sewer. The Court further held that it was immaterial: (1) that the buyer at the time of the execution of the contract knew from the appearance of the property of the existence of the easement; (2) that the easement may have been beneficial.
that the buyer was entitled to recover his deposit because of the seller's inability to perform according to the contract the Court distinguished the case from those in which the encumbrance was in its nature removable, such as a tax lien.

The soundness of the decision is not open to doubt. In principle, a party to a contract who is unable to perform should not be permitted to retain the benefits of the contract on the basis of conduct of the other party which in no way caused him to change his position. In reaffirming this principle, moreover, the Court removed the confusion that has characterized the cases in this area.

The increased importance in the last few years of subdivision control by planning boards makes it essential for developers contemplating the acquisition of land to protect themselves against being obligated to purchase under a contract that contains no well-defined escape in the event of difficulty in obtaining planning board approval. A builder found himself in such a predicament in Stabile v. McCarthy. The contract by its terms gave the buyer the option to cancel the agreement "in the event that he shall have been unable to obtain the approval of the Wilmington Planning Board of his proposed sub-division of the . . . premises prior to the date . . . set for performance . . ." The Court construed this clause as requiring the buyer to make reasonable efforts to obtain the specified approval. It then ruled that the evidence was insufficient (despite some preliminary efforts on the part of the buyer) to warrant a finding that he had made reasonable efforts to obtain approval and, therefore, denied him recovery of his deposit.

In an able opinion by Mr. Justice Cutter, the Court pointed out the ambiguous nature of the "unable" clause, the logical necessity of implying an agreement by the buyer to attempt to obtain approval so as to avoid the conclusion that the parties had intended an option to buy rather than a contract to buy, the degree of effort required of the buyer, and alternative clauses that the parties might have adopted if they had intended that there should be no obligation on the buyer to

6 The Court, in effect, repudiated Marcus v. Clark, 185 Mass. 409, 70 N.E. 433 (1904), which held that the buyer had "waived" his right to object to an encumbrance (restrictive covenant running to City of Boston) by failing to specify it as a reason for non-performance prior to time for performance although he had knowledge of the encumbrance.
7 336 Mass. 399, 145 N.E.2d 821 (1957). The case is further discussed in §4.2 infra.
8 A long line of cases extending from Old Colony Trust Co. v. Chauncey, 214 Mass. 271, 101 N.E. 423 (1913), to Barrett v. Carney, 1958 Mass. Adv. Sh. 745, 150 N.E.2d 276, has held that a clause in a purchase and sale agreement reciting that if the seller "shall be unable to give title or make conveyance as stipulated" the obligations of the parties under the contract shall come to an end imposes no duty on the seller to take action to remove the defects in the title. These cases are distinguishable from Stabile because the state of the seller's title is an existing fact apart from the conduct of the seller whereas, in Stabile, "to obtain the approval of the Wilmington Planning Board" some kind of action by the buyer is clearly necessary and contemplated by the parties. The question then becomes: What kind of action is required by the buyer?
take action.\textsuperscript{9} The decision will, no doubt, become a leading case on the points involved.

\section*{§1.6. Vendor and purchaser: Option to repurchase and inchoate dower.} Only rarely is the Supreme Judicial Court called upon in modern times to consider the nature of dower. This relic of feudal days is infrequently the subject of litigation. Its principal function at the present time is to provide a nuisance value in connection with property settlements on divorce and to cause headaches to conveyancers. Yet during the 1958 Survey year a decision and an advisory opinion dealt with dower. \textit{Forte v. Caruso}\textsuperscript{1} raised the question of whether an option to repurchase contained in a purchase and sale agreement\textsuperscript{2} was enforceable against the optionor and his wife despite the latter’s asserted claim of inchoate dower in the premises. In holding that the wife’s inchoate right of dower was subordinate to the rights of the optionee the Court stressed the derivative nature of dower and ruled that the equitable interest of the optionee constituted an “infirmity” in the husband’s title when he acquired it and, therefore, the wife’s rights were subject to that infirmity.\textsuperscript{8}

The constitutionality of proposed legislation to limit dower and curtesy interests to lands owned by the deceased spouse at the time of his death was upheld in an advisory opinion\textsuperscript{4} by the Court even though by the terms of the bill it would affect existing rights of inchoate dower and curtesy. Despite this clearing away of an alleged constitutional impediment the bill failed to become law when the governor abstained from signing it within the prescribed constitutional time.

\section*{§1.7. Scope of covenants in quitclaim deed.} The usual form of quitclaim deed in use prior to the effective date (January 1, 1913) of the Short Forms Statute\textsuperscript{1} contained a covenant by the grantor that the granted premises “are free from all incumbrances made or suffered by one of the parties had intended no obligation on the plaintiff to take action they could have used a clause in the special provision importing no suggestion of obligation, inability or impossibility, or could have made the vendor’s obligation to convey and the vendee’s obligation to purchase ‘subject to’ the granting of approval . . . instead of making inability to obtain planning board approval a condition precedent to the exercise of a right to cancel.” 336 Mass. 399, 403, 145 N.E.2d 821, 823 (1957).

\textsuperscript{9} “If the parties had intended no obligation on the plaintiff to take action they could have used a clause in the special provision importing no suggestion of obligation, inability or impossibility, or could have made the vendor’s obligation to convey and the vendee’s obligation to purchase ‘subject to’ the granting of approval . . . instead of making inability to obtain planning board approval a condition precedent to the exercise of a right to cancel.” 336 Mass. 399, 403, 145 N.E.2d 821, 823 (1957).

\textsuperscript{1} 336 Mass. 476, 146 N.E.2d 501 (1957).

\textsuperscript{2} The optionor’s wife had not signed the purchase and sale agreement containing the option to the seller to repurchase. Prior to the exercise of the option by the seller the buyer conveyed the premises to his wife for nominal consideration. She had knowledge of the option. The Court held, therefore, that she was not a bona fide purchaser for value and the conveyance to her was not a bar to specific performance.


\section*{§1.7.} 1 G.L., c. 183, §§8-28 and Appendix.
me.” 2 The omission of the words “or suffered” in the statutes defining the scope of the covenants in the statutory form of quitclaim deed had created doubt as to whether the changed language was intended to restrict the scope of the covenant to encumbrances “made” by the grantor. In Fanger v. Leeder 3 it was intimated that the omission of the words “or suffered” was intentional. The question has now been definitively settled. In Engel v. Thompson 4 it was held that the short form statute was not intended to change the substantive law in this respect and that the omission of the words “or suffered” from the statute did not limit the liability of the grantor to encumbrances made by him as distinguished from those suffered by him. The encumbrance in the case was a liability for a sewer assessment. 5 Since the grantor could have discharged the assessment by payment he was held to have “suffered” the encumbrance of the lien.

C. PERSONAL PROPERTY

§1.8. Co-ownership of bank accounts. The standard form of co-ownership of savings bank deposits is that of joint tenancy. Because the usual form of the account standing in the names of two persons expressly makes the deposit payable to the survivor the intention of the depositor is effectuated by treating the co-ownership as being one in joint tenancy. Yet despite the survivorship form of the account the parties may be treated as tenants in common if such was their intention, according to the decision in Arsenault v. Arsenault. 1 In that case the husband had deposited his own money in savings accounts in the joint names of himself and his wife and had also purchased United States savings bonds in their two names. Later the parties separated after domestic quarrels and the wife took with her the bank books and the bonds. In an effort to induce the wife to return, the husband told her that the money and bonds would “belong to both equally and that they would always be that way.” The wife returned to their home and replaced the bank books and bonds in their former location. A few months later the husband withdrew all of the monies on deposit, without the knowledge of his wife, and also cashed the bonds. Almost two years later the parties separated again and the wife brought a bill

3 327 Mass. 501, 99 N.E.2d 533 (1951). For a statement by a member of the committee of conveyancers that drafted the short forms act that the committee intentionally omitted from the statute the words “or suffered” in order to cut down the grantor’s liability, see 36 Mass. L.Q. No. 3, p. 48 (1951).

in equity against the husband for an accounting of the proceeds of the savings accounts and the bonds. In affirming a decree ordering the husband to pay the wife one half of the value of the accounts and the bonds the Court held that the husband’s statement that the property would “belong to both equally” evidenced an intent to make a gift to the wife of a one-half interest therein and since the accounts and the bonds already stood in their joint names no further act was necessary to vest title to a half interest in the wife as a tenant in common.

The Court’s conclusion that, despite the form of the account, the parties’ interests were those of tenants in common was unusual and may have been based upon a desire to avoid the question of the husband’s right to revoke the gift of an interest in joint tenancy by the exercise of an impliedly reserved power to revoke. Yet the Court could have inferred an irrevocable gift to the wife of an interest in joint tenancy by construing the words of the husband that the accounts would “always” belong to both equally as showing an intent that the gift be irrevocable. While ownership in joint tenancy with its incident of survivorship may not have been the most appropriate form of co-ownership for these separated spouses the critical question was the intent of the donor-husband at a time of attempted reconciliation and there was nothing to show that he intended a relationship other than that normally following from the form of the deposit. As a result of the case we apparently have an anomalous exception to the anomalous doctrine of joint accounts.

In another husband and wife case involving joint bank accounts and savings bonds the Court sustained a finding by the trial judge that the accounts and the bonds were the sole property of the husband but reversed a finding that a certain mortgage and note in the names of the husband and wife as tenants by the entirety belonged solely to the husband. As to the bank accounts and the bonds the Court pointed out that the wife had no knowledge of them until after marital discord had developed and concluded that: “There was not a completed gift

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2 Treasury regulations governing the payment and redemption of United States savings bonds would seem to create a modified joint tenancy when the bonds, as in the Arsenault case, are registered in the names of two persons as co-owners. 31 Code Fed. Reg. §315.60 (Supp. 1958). It is not clear what effect, if any, the regulations have on the rights of the co-owners with respect to the proceeds of the bonds upon payment. See Note, Rights of Co-owners and Beneficiaries of United States Savings Bonds, 1947 Wis. L. Rev. 447; Note, Rights of Registered Co-owners and Beneficiaries of United States War Savings Bonds, 52 Yale L.J. 917 (1943).

3 It was held in Kittredge v. Manning, 317 Mass. 689, 59 N.E.2d 261 (1945), that a gift of an interest in a joint account could be effectuated by the expression of such donative intent after the opening of the account in the joint form even though at the time the account was created the depositor had no intent to make a gift.


either by delivery of the bank books or the bonds . . . or by action having the same effect." 6 Since the contract of deposit with the bank is a substitute for the delivery normally required for a gift,7 this statement would seem to mean that for the creation of a property interest in accounts and bonds notice from the donor to the donee of the joint form of the holdings, or something equivalent thereto, is necessary.8 As an additional ground of decision the Court held that on the evidence the trial judge was warranted in finding an absence of intent to make a gift of an interest in joint tenancy.9

With respect to the mortgage and note standing in the names of the parties as tenants by the entirety the Court apparently took the transaction at its face value in holding that both spouses held an interest as such tenants in the security and in the proceeds of the note. It would seem, however, that as in the matter of the joint bank accounts the controlling question of fact was the intent of the parties as to the creation of a beneficial interest in the wife.10 In holding that the tenancy by the entirety attached to the money received in payment of the mortgage note the Court followed the case of Childs v. Childs11 and, adopting the real property rule, stated that the husband was "to have possession and the use and usufruct of such money during his life and upon the death of either the survivor should be entitled to all of the money." 12

8 This would seem to be inconsistent with the doctrine of implied acceptance by virtue of which a gift takes effect immediately upon the execution by the donor, even though the donee is not aware of the donor's intent to give. Miller v. Herzfeld, 4 F.2d 355 (3d Cir. 1925); Standing v. Bowring, L.R. 31 Ch. D. 282 (1883); see Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228, 231 (1870). Assuming an intent on the part of the depositor to make a gift of a joint interest in the accounts, the contract of deposit would effectuate the gift. Castle v. Wightman, 503 Mass. 74, 70 N.E.2d 436 (1939).
9 The evidence as to the husband's intent in creating the joint accounts was meager. This was probably due to the fact that the wife's petition for an accounting was based upon the theory that because of a pre-marital arrangement the husband held the savings from the wife's earnings in trust for her. She failed to prove the existence of a trust.
10 McPherson v. McPherson, 1958 Mass. Adv. Sh. 921, 150 N.E.2d 727. In fact, it could be inferred from the husband's testimony that he did intend that his wife would hold an interest in the mortgage as a tenant by the entirety. Record, pp. 75, 76.
12 1958 Mass. Adv. Sh. 909, 915, 150 N.E.2d 699, 703. The Court held that a decree of living apart for justifiable cause did not convert the tenancy by the entirety into a tenancy in common.