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Chapter 1: Property and Conveyancing

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PART I

Private Law

CHAPTER 1

Property and Conveyancing

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§1.1. Landlord and tenant: Termination of tenancy at will by conveyance. In Stedfast v. Rebon Realty Co., the Supreme Judicial Court held that an existing tenancy at will was terminated by a conveyance of the leased premises to a corporation dominated by the landlord, and that the receipt of rent after the conveyance to the corporation resulted in the creation of a new tenancy at will between the tenant and the corporation. This new tenancy (which may be created even though the tenant has no notice of the conveyance to the corporation) is governed by a different tort standard than the old tenancy; the obligation of the corporate landlord is to use reasonable care to maintain the common passageways within its control in as good a condition as they were, or appeared to be, at the time of the creation of the new tenancy. Although the landlord’s conveyance of his realty to a corporation dominated by the landlord may be motivated by business and estate planning considerations and may not have been viewed primarily as an attempt to reduce the landlord’s tort obligations, we still cannot lose sight of the adverse and detrimental effect that the Stedfast rule has on injured tenants. The basic inequities of the Stedfast rule were once again demonstrated this year when the doctrine was applied in Auld v. Jordan.

In Auld, the plaintiff tenant was injured by a fall in a common passageway. The plaintiff originally became a tenant in this building in 1943, when the premises were owned by the defendant, Jordan, as trustee under a will. Upon the death of the life beneficiary of the trust,

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Jordan became owner of the building in his own right and thereafter conveyed the premises to himself and his wife. On July 24, 1956, he and his wife conveyed the premises to W. E. Jordan & Sons, Inc., a Massachusetts corporation. The Court, applying the Stedfast rule, held that the trial judge had correctly directed a verdict for Jordan since he, in his individual capacity, was no longer the landlord. Furthermore, the Court indicated that suit against the corporation would also prove to be futile since under Stedfast the corporation had only a duty to use reasonable care to maintain the area in as good a condition as the premises were, or appeared to be, at the time of the first receipt of rent by the corporate landlord. The Court reached this conclusion in the face of the evidence introduced that the plaintiff tenant was not notified of any of the transfers and the testimony of Jordan that he always "considered himself the landlord and intended to be the landlord" and that he "never made any representation to the plaintiff that he was not the landlord." Furthermore, all rent receipts were signed at all times in Jordan's name.

It would appear to this writer that, upon these facts, a decision for the landlord is unwarranted. A holding for the tenant who has placed his reliance upon the continuance of the old tenancy (and who has relied upon representations made by Jordan) can be justified upon principles akin and analogous to estoppel. Furthermore, in another case decided during the 1960 Survey year, Cairns v. Giumentaro, the Court intimated that the Stedfast rule would not be applied when a tenant holds over after the termination of a lease. In Cairns the Court concluded that the parties impliedly agreed to a tenancy on the same terms and conditions as those of the prior tenancy. Is it thus not anomalous to hold that one party may unilaterally alter the rules governing the relationship in the fact situation present in Auld? If the Stedfast rule is to retain any popular vitality, it should be limited to the situation in which the tenant has received notice of the transfer. Since the landlord has retained legal counsel to organize the corporation and to effect the transfer, the requirement of notice would not appear to be an onerous burden.

§1.2. Landlord and tenant: Constructive eviction. The Supreme Judicial Court has not been completely unkind to tenants this year. To the contrary, it reached a result fair and beneficial to tenants in Charles E. Burt, Inc. v. Seven Grand Corp. At law, in order to take advantage of a constructive eviction, the tenant must abandon the leased premises within a reasonable time after the acts alleged to constitute a constructive eviction are committed. The remedy at law is obviously incomplete and hazardous since it requires the lessee to determine at his peril that the circumstances amount to a constructive


eviction and to vacate the premises (possibly at some expense), while
continuing to be subject to the risk that a court may decide that the
lessor has not materially breached the lease. The Supreme Judicial
Court ameliorates this situation in the Burt case by giving the tenant
equitable relief in appropriate circumstances, by way of a declaration
under G.L., c. 231A, that the acts of the lessor justify the lessee in
treating those acts as a constructive eviction and thus entitle him to
vacate the premises (and if he does vacate the premises within a reason-
able time, to have damages assessed in his behalf). 3

§1.3. Landlord and tenant: Construction of redelivery clause. In
Guarente v. Waldorf System, Inc., 1 a tenant sought to defend a suit
brought against him for the breach of the covenant to redeliver the
premises in a reasonably clean and tenantable condition by relying
upon another clause in the lease that read that no default “shall be
deemed to have occurred or constitute a basis of forfeiture of this lease”
unless it has continued for a stated time after notice. The Court held
that the notice requirement is applicable only as long as the lessee has
an estate in the premises, 2 and hence the notice requirement cannot be
applicable to the redelivery clause, which by its very nature is breached
only upon a termination of the tenancy. To hold otherwise would re-
result in a right being implied in the tenant to enter the premises after
the termination of the tenancy. Furthermore, the notice requirement
appeared in a paragraph immediately following the paragraph in the
lease dealing with the lessor’s right of entry for condition broken.
This factor buttressed the Court’s feeling that the notice requirement
is primarily of significance only during the term when it is a means of
avoiding a forfeiture. Unfortunately, the Court did not clearly
indicate whether it would adopt a similar construction if the notice re-
quirement had appeared in a different context or sequence in the
lease. 3

§1.4. Landlord and tenant: Summary process to collect rent. Prior
to the 1960 Survey year, summary process was available only as a means
of obtaining possession of leased premises. In the interest of avoiding
cumbersome and protracted litigation, the 1960 legislature amended
G.L., c. 239, and extended it so that summary process is now available
for the purpose of collecting rent in arrears. 1

§1.5. Statutory short-form quitclaim deed: Covenants against en-
cumbrances “suffered” or “made” by grantor. In Engel v. Thomp-
son, 1 it was held that the statutory covenant against encumbrances 2

3 1960 Mass. Adv. Sh. 915, 916, 167 N.E.2d 617, 619. In this case the Court, because
of the context and sequence of paragraphs in the lease, discounted the com-
prehensiveness of the language employed in the notice paragraph and the fact that
the lease was prepared in the office of the plaintiff’s attorney.
§1.4. 1 Acts of 1960, c. 239.
§1.5. 1 336 Mass. 529, 146 N.E.2d 657 (1957).
2 G.L., c. 183, §16.
would be construed to include encumbrances "made or suffered" by the grantor even though the statute does not refer to encumbrances "suffered" by the grantor. At least one commentator considered Engel as definitively declaring the law in this state. However, the Supreme Judicial Court during the 1960 Survey year overruled this aspect of the Engel case.

In Silverblatt v. Livadas, the Court, relying upon material that had not been called to its attention in the Engel decision, held that the short-form covenant does not include encumbrances "suffered" by the grantor. The Court reached this conclusion by relying upon a negative inference that it drew from the provision in the statute permitting an alteration of the short forms. In addition, the Court relied upon the commentary of Frank W. Grinnell, Esq., one of the draftsmen of the statute, who had noted that the omission of the words "or suffered" from the statute was a deliberate omission to aid grantors in urban communities who prefer not to warrant title against unknown claims. It should be noted, however, that this decision has no effect at all upon the nature of the covenants in a statutory short-form general warranty deed. Because of the general language employed in the statute pertaining to the statutory short-form general warranty deed, the grantor of such a deed is deemed to covenant against all encumbrances.

Inasmuch as the statutory short-form quitclaim deed is now deemed to include only encumbrances "made" by the grantor, it becomes imperative to determine when an encumbrance is "made by the grantor." Unfortunately, the Massachusetts cases do not clarify this concept. In Silverblatt, the Court interpreted "made" as implying more than "mere inaction" by the grantor. In this case, the grantor had failed to repair a defective fire escape. Pursuant to G.L., c. 143, a building inspector may cause such a structure to be made safe or taken down and any costs incurred in the process constitute a lien upon the land. Prior to the conveyance in question, the grantor had received a preliminary notice, but not a final binding order, to remove the defective structure. The Court held that since there was mere inaction by the grantor, no encumbrance was "made" by the grantor. The Court did not definitively draw a line between "action" and "inaction."

§1.6. Statutory short-form quitclaim deed: Covenant to warrant and defend against the claims of persons claiming by, through, or under grantor. The nature of the covenant to warrant and defend against the claims of persons claiming by, through, or under the grantor has also not been clarified by the Supreme Judicial Court. In fact, the Court has made seemingly inconsistent statements, without any attempt at reconciliation, in this area. In Hill v. Bacon the Court spoke of a
lien for real estate taxes as arising "through" a grantor. In the later case of Weeks v. Grace, it intimated that the contrary was true. In addition, in Weeks the Court considered rights that arise and are acquired by eminent domain as not arising "by, through or under the grantor." However, the Court does consider rights arising by escheats, forfeitures, foreclosures of mortgages, and assignments in bankruptcy as arising "by, through or under the grantor."  

During the 1960 Survey year, the Court specifically reaffirmed that portion of Weeks holding that rights acquired by eminent domain are not included in the statutory covenant. In addition, in Silverblatt the Court held that if a city, subsequent to a conveyance, incurs costs in removing defective structures (thus entitling the city to a lien for these costs), the covenant would not be breached since no obligation had (on the facts of the case) been imposed upon the grantor prior to the transfer. The Court, however, refused to determine whether a lien for real estate taxes would be violative of the covenant.

§1.7. Surviving tenant by the entirety: Exoneration by estate of deceased co-tenant. When a husband and wife purchase property as tenants by the entirety and execute a joint note and mortgage as payment of part of the purchase price, there is a split of authority as to whether the survivor who satisfies the common obligation may recover contribution from the deceased co-tenant's estate. In Ratte v. Ratte, Massachusetts disallowed recovery, while decisions in Maryland, New Jersey, and Pennsylvania have recognized the right of contribution. This year, Massachusetts, in Florio v. Greenspan, reaffirmed its ruling in Ratte and did not allow contribution.

In Florio, a husband and wife acquired title to realty as tenants by the entirety. The purchase price was $40,000. Of this sum, the husband contributed $12,000 and the wife $8,000. The balance of the purchase price was financed from the proceeds of a bank loan that was secured by a mortgage. Both the mortgage and the note were jointly executed by the husband and the wife. The husband died a few months later. At the time of his death, the amount remaining due on the note was $19,675.50. At the time of the trial, as a result of payments made by the wife, the unpaid balance was $16,342.55. The wife brought a bill in equity for declaratory relief against the husband's estate for an adjudication that the unpaid balance of the note was an obligation of the estate that the administrator must discharge. On the basis of these facts, the trial judge ruled that the wife was not entitled

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3 194 Mass. 296, 301, 80 N.E. 220, 222 (1907).
4 194 Mass. at 300-302, 80 N.E. at 222.
5 Horn v. Crest Hill Homes, Inc., 340 Mass. 362, 365, 164 N.E.2d 150, 152 (1960), also noted in §1.8 infra.

§1.7. 1 260 Mass. 165, 156 N.E. 870 (1927).
5 340 Mass. 642, 165 N.E.2d 753 (1960), further noted in §9.1 infra.
to contribution or exoneration from the husband’s estate with respect of the note either in whole or in part. The Supreme Judicial Court affirmed this ruling. The Massachusetts view considers contribution in these circumstances to be inequitable since, when payments are to be made on the note after the husband’s death, the wife will be the sole owner of the property, and discharge of the mortgage will be for her benefit alone.

The Massachusetts rule is unsound. Inasmuch as the mortgagee had the power to proceed against the decedent’s estate, it is evident that the payment of the note by the survivor discharges a legal obligation of the estate. Hence, the decedent’s estate is benefited by the lifting of the common burden. The Massachusetts rule inaccurately adopts as the standard for contribution the test of equality of interest and not the appropriate test of equality of obligation. In addition, the Supreme Judicial Court fails to recognize that the surviving tenant by the entirety does not gain any new interests in the property through the incident of survivorship. Tenants by the entirety are deemed to be seised per tout et non per my. When one tenant dies, the estate of the survivor is “simply freed from participation by him.”

The Court is cognizant, in the present case, of the inequities of its rule when applied to the situation in which the value of the property is lower than the amount of the indebtedness. Hence, it specifically refrains, by dicta, from passing judgment as to its course of action in those circumstances.

§1.8. Dedication: Drainage easement. The typical situations with which the law of dedication is concerned are streets, parks and burial grounds. There are no Massachusetts cases holding that a drainage easement can be transferred by means of a dedication. In the recent case of *Horn v. Crest Hill Homes, Inc.*, the Supreme Judicial Court specifically refrained from deciding the point. It did, however, reiterate the well-established principle that a dedication requires an offer to dedicate and an acceptance of the dedication.

§1.9. Sewer easement: Extinguishment by merger in fee acquired by tax foreclosure. *O’Malley v. Commissioner of Public Works of Boston* poses the interesting question of whether the foreclosure of a tax title by a city extinguished a sewer easement taken after the creation of the tax title but before the foreclosure. The usual rule is that

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6 See Osborne, Mortgages 785 (1951).

2 See 4 Tiffany, Real Property, c. 24 (1939).

an easement is extinguished by unity of ownership of estates in the
dominant and servient tenements. Hence, it was contended that by
the foreclosure the city's easement was merged in the fee acquired by
the foreclosure. However, merger does not occur if the two interests
are not united "in the same person and in the same right." Thus
the Supreme Judicial Court pointed out that it could sustain a finding
of a continuance of the easement on the basis that the sewer easements
were acquired for a different purpose than the tax title. Not being
desirous of resting its decision upon this ground, the Court based its
finding of a continuance of the sewer easement upon the ground that
when the city subsequently sold the foreclosed premises it thereby "re-
served" the duly recorded sewer easement rights. To this writer, this
is a strained construction of the deed because, if merger had already oc-
curred, the grantor city had nothing that it could have "reserved."

§1.10. Gift: Joint bank account. The question of making a gift
of an interest in a joint bank account, which was cogently explored
in the 1959 ANNUAL SURVEY, received some additional clarification
during the 1960 SURVEY year in Corkum v. Salvation Army of Massa-
chusetts, Inc. In this case the Supreme Judicial Court, without de-
ciding whether notice to the donee is necessary in order to effectuate
a gift of an interest in a joint savings bank account, held that notice to
the donee is an important factor as far as the requisite of donative in-
tent is concerned.

§1.11. Tenancy by the entirety: Statutory inheritance tax exemp-
tion. In the recent case of Evans v. Commissioner of Corporations
and Taxation the Supreme Judicial Court definitely held that there
is a $25,000 inheritance tax exemption upon multiple-residence prop-
erty owned by spouses as tenants by the entirety, in which the surviv-
ing spouse and the deceased spouse had their domicile even though
they did not occupy the entire property. Nevertheless, the benign
state tax treatment of such an estate should not cause the estate plan-
er to overlook certain federal tax pitfalls and other nontax problems
incident to joint ownership. The prudent planner should still bear
in mind Paul Sargent's admonition to "Stay Away from Expensive
Joints."