1-1-1961

Chapter 1: Property and Conveyancing

William Schwartz

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Property Law and Real Estate Commons

Recommended Citation
PART I
Private Law

CHAPTER 1
Property and Conveyancing
WILLIAM SCHWARTZ

A. Legislation

§1.1. Mortgages held by the entirety: Defective discharges. Prior to the decision in Pineo v. White,1 many conveyancers thought that if a husband and wife held a mortgage and note as tenants by the entirety, the mortgage could be discharged by the wife's signing the discharge (and that there was no need for both spouses to sign), if the mortgage note was surrendered.2 This opinion was based upon the assumption that G.L., c. 183, §54,3 authorized a discharge in this manner. In Pineo v. White,4 the Supreme Judicial Court held that the mortgage was not discharged by the wife alone signing the instrument of discharge and surrendering the notes, since the statutory provision for discharge by one or more joint holders of a mortgage5 did not apply to holders by the entirety.

Inasmuch as some lawyers had "guessed at the meaning of Section 54 with the result that titles are clouded where both did not sign the

WILLIAM SCHWARTZ is Professor of Law at Boston University Law School.

3 "One of two or more joint holders of a mortgage may discharge it by a deed of release duly acknowledged and recorded. A mortgage may also be discharged by a written acknowledgment of payment or satisfaction of the debt thereby secured, or of the conditions therein contained, signed and sealed by the mortgagee, his executor, administrator, successor or assignee. Such instrument shall have the same effect as a deed of release, shall be valid if executed by one of two or more joint holders of a mortgage and may be recorded when duly acknowledged or on proof of its execution in accordance with sections thirty-four to forty-one, inclusive."
5 G.L., c. 183, §54, quoted in note 3 supra.
discharge," remedial legislation was needed. In 1950, the following bill was proposed: "If a husband and wife are holders of a mortgage, either one of them may discharge the mortgage as herein provided and such discharge shall have the same effect as if they were sole." The bill was referred to the Judicial Council, but it did not gain its approval. The council did not recommend the bill, since it felt that the policy of protecting the integrity of the estate by the entirety and the marital relation and its incidents outweighed the conveyancing difficulties.

A bill, similar to the 1950 measure, was submitted to the Judicial Council in 1960. Again, the council did not recommend the proposed legislation. The council reasoned that "it would be a mistake to have one kind of tenancy by the entirety for a lot of land and another for a mortgage on the same land." While the council did appreciate the fact that some titles may be clouded, it felt that the problem could be handled more propitiously by the enactment of a title-clearing statute. Hence it recommended the enactment of Acts of 1961, c. 275, which was subsequently passed by the legislature and became Section 54A of G.L., c. 183.

Under the statute, no action can be taken to enforce a mortgage or the mortgage notes after the expiration of a period of ten years from the recording of a discharge or release of a mortgage signed by only one of the spouses unless the nonsigning spouse records, within that ten-year period, a notice that rights of a tenant by the entirety may be claimed in the mortgage or the notes secured thereby. The statute is applicable to discharges and releases signed before its effective date as well, but as to these, the nonsigning spouse may preserve his rights by recording a notice prior to January 1, 1963.

This writer is not completely convinced that this statute is a wise and prudent measure. For one thing, it permits title to land to remain clouded for ten years. Secondly, the task of the conveyancer is made more onerous by the proliferation of statutory timetables of different lengths for different types of interests. Finally, the council rejected the earlier proposal on the grounds that "it would be a mistake to have one kind of tenancy by the entirety for a lot of land and another for a mortgage on this same land." In actuality, the proposal would only have affected one aspect of the tenancy by the entirety of a mortgage, namely, the discharge thereof. Furthermore, the legislature, in other situations, does recognize that a mortgage of land should be treated differently from ownership of the land. Thus G.L., c. 184, §7, provides:

8 Id. at 31.
9 Ibid.
11 Ibid.
12 Id. at 40.
13 Id. at 41.
§1.2 PROPERTY AND CONVEYANCING

A conveyance or devise of land to two or more persons or to husband and wife, except a mortgage . . . shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly . . . [Emphasis supplied.]

It should also be noted that the statute provides that no action can be brought at the end of the ten years on the mortgage notes. Presumably, holders in due course of the mortgage note would also be precluded. Ordinarily, under the Uniform Commercial Code, the recordation of a document does not constitute notice to a person who would otherwise be a holder in due course.

§1.2. Obsolete restrictions: Enforceability. In the 1961 Survey year the legislature continued its quest for greater title certainty and marketability by enacting Acts of 1961, c. 448. The statute is significant in two respects. First of all, it authorizes a proceeding in equity whereby a landowner may receive a judicial determination that a restriction upon his land is or is not enforceable or that it is only partially enforceable. Furthermore, the equity court may determine that the restriction is enforceable only by the award of money damages, and may determine upon the payment thereof that the land is free of the restriction, even if the restriction has not been violated.

Under the statute, no restriction is enforceable unless it is determined at the time of the proceeding that the restriction is of actual and substantial benefit to the person claiming rights of enforcement. Even if the restriction actually and substantially benefits the person claiming rights of enforcement, it is not specifically enforceable in equity (and only money damages may be awarded) if: (1) changes in circumstances materially reduce the need for the restriction accomplishing its original purpose, or render it obsolete or inequitable to enforce specifically, or (2) the party seeking equitable relief has acted in an inequitable manner (lack of clean hands and laches), or (3) the equitable enforcement is for any other reason inequitable or not in the public interest. In addition, in the case of a common scheme, the restriction will not be specifically enforced if the land of the person seeking such enforcement is for any reason no longer subject to the restriction or the land against which enforcement is sought is not in a group of parcels still subject to the restriction and appropriate for accomplishment of its purposes. Furthermore, the statute explicitly states that equitable enforcement will be denied if the restriction impedes the reasonable use of land for purposes for which it is most suitable, or if it tends to impair the growth of the neighborhood or municipality in a manner inconsistent with the public interest, or if

14 G.L., c. 106, §3-304(5).
it tends to contribute to a deterioration of properties or results in sub-
standard or blighted areas.

Although the Judicial Council feels that this procedure is constitu-
tional,\(^2\) it may be contended that the statute is void on the grounds
that it is violative of Articles 1 and 10 of the Declaration of Rights
of the state Constitution. Although the grounds for declaring land
to be free of imposed restrictions are fairly tightly drawn and specifi-
cally set forth, the statute is somewhat similar to the one held un-
constitutional in Riverbank Improvement Co. v. Chadwick.\(^3\)

The statute also provides that a restriction is not enforceable, even
if it is equitable to enforce it and the restriction is of actual and sub-
stantial benefit, unless certain other statutory requirements are met.
Thus, in the case of restrictions imposed after December 31, 1961, the
restriction is not enforceable after thirty years from the imposition
of the restriction unless either (1) the person seeking enforcement is a
party to the instrument imposing the restriction and the restriction is
stated to be for his benefit or (2) the person seeking enforcement owns
land for the benefit of which such a restriction has been imposed
which either adjoins the burdened land or is described in the instru-
ment imposing the restriction as being land benefited by the restric-
tion. Furthermore, even though these alternative requisites are met,
there is the additional condition for enforcement that a notice of re-
striction be recorded before the expiration of thirty years from the
date of the imposition of the restriction. However, the statute does
authorize extensions of restriction for a period of twenty years pro-
vided that a notice of restriction has been rerecorded. Thus the
statute authorizes the perpetual re-creation of restrictions by the filing
of a new notice of the restriction. This is not necessarily an un-
derirable result, since the statute in subsequent sections, as has been
pointed out earlier, renders restrictions totally unenforceable unless
they are of an actual and substantial benefit to the person claiming
rights of enforcement, and unenforceable in equity if it would be in-
equitable or against the public interest to so enforce them. Hence
there is no danger of control by the dead hand.\(^4\)

The statute sets up a detailed procedure for extending restrictions.
In the case of restrictions that are not imposed as part of a common
scheme applicable to four or more contiguous parcels, the extension
notice must be filed within twenty years after the recordation of a prior
notice. When the restriction is imposed as part of a common scheme
applicable to four or more parcels, the time schedule is similar but an
extension is allowed only if provision is made in the instrument im-

\(^3\) 228 Mass. 242, 117 N.E. 244 (1917). The Judicial Council treated the Riverbank
improvement Co. v. Chadwick case as follows: "It is, perhaps, open to question whether that constitutional opinion
was necessary as all the court did was to refuse to disturb the restriction on the facts." Thirty-sixth Report of the Judicial Council, Pub. Doc. No. 144, p. 82 (1960).
\(^4\) See generally Simes, Public Policy and the Dead Hand (1955).
§1.4 PROPERTY AND CONVEYANCING

posing the restriction for an extension by the owners of record of 50 percent or more of the restricted area.

As far as restrictions imposed before January 1, 1962, are concerned, they are not enforceable after the expiration of fifty years from the date of their imposition unless a notice of restriction is recorded before the expiration of those fifty years or before January 1, 1964, whichever is later. There are also statutory provisions for extending such restrictions.

The statute also amends G.L., c. 184A, §3, and thus alters certain rules pertaining to rights of entry and possibilities of reverter. Prior to the enactment of Chapter 448, possibilities of reverter and rights of entry were valid and enforceable even beyond the thirty-year period if the contingencies in question were so limited that they had to occur, if at all, within the period of the rule against perpetuities. Thus if O, owner of Blackacre in fee simple absolute, conveyed it to "A and his heirs, provided that liquor is not to be sold upon the premises during A's lifetime, but if liquor is sold upon the premises during A's lifetime O and his heirs may re-enter and retake the premises," the right of entry retained by O was valid and is enforceable for more than thirty years since it would take effect, if at all, within the lifetime of A, who is a life in being for the purpose of the rule against perpetuities. Under the new statute, such a restriction would not ordinarily be enforceable for more than thirty years. However, if a person has a right of entry or possibility of reverter which would have been valid before the amendment, he may enforce it provided that a notice is recorded prior to January 1, 1964.

§1.3 Suspension or revocation of a real estate broker's license: Massachusetts Commission Against Discrimination. Acts of 1961, c. 181, provides that the failure of a broker or salesman to comply with an order of the Massachusetts Commission Against Discrimination is grounds for suspension, revocation, or refusal to renew his license. In addition, Acts of 1961, c. 128, broadens the Housing Discrimination Law1 so as to make it unlawful to discriminate in negotiations, and specifically includes brokers within the law.2

B. DECISIONS

§1.4 Assignment or sublease. One of the most vexing problems in landlord and tenant law is the determination of whether a transfer of a lessee's interest is an assignment or a sublease. The problem frequently arises in the context of a lease clause prohibiting one and

---

1 G.L., c. 151B, §4.
permitting the other. Thus in Lebel v. Backman the lease provided: "Lessee may sublet but will not assign this lease without first obtaining on each occasion the consent in writing of the lessor." The lessee then proceeded to transfer, without the lessor's consent, his leasehold interest for the duration of the term. Some of the terms in the instrument of transfer went beyond those in the original lease, and the lessee reserved the right to terminate the transferee's estate if the covenants of the instrument of transfer were broken. The Supreme Judicial Court construed the transfer to be a sublease and enjoined the original lessor from interfering with the sublessee's quiet enjoyment of the premises.

If the interest transferred by the lessee is for a period of time less than that of the remaining term of the original lease, the courts will construe the transfer to be a sublease. Greater difficulty is presented when the lessee transfers his right to possession for the duration of his term. The majority of courts deem such a transfer to be an assignment. However, a substantial minority follow the so-called Massachusetts view that a transfer for the duration of the lessee's original term may still be a sublease if the instrument of transfer contains covenants not found in the original lease or if the lessee reserves a right of entry for condition broken. In the Lebel case, the Court adhered to this minority view.

The majority view appears to be based upon the notion that a sublease, which results in a landlord-tenant relationship being created between the lessee and his transferee, requires that a reversionary estate be retained by the lessee. The majority of courts evidently feel that a right of entry or new covenants are not estates. In actuality, there appears to be no compelling reason that the presence of a sublease be predicated upon the retention by the lessee of a reversionary estate. Indeed, in the case of suits between the lessee and his transferee, the majority of courts concede the presence of a sublease if the parties intended a sublease regardless of the result these same courts reach in the case of litigation between the lessor and the lessee's transferee. It has been suggested that the better rule is to allow the intention of the lessee and his transferee to govern if the lessor is not prejudiced thereby. Thus the holding in Lebel may be justified on

4 Ibid.
5 Patten v. Deshon, 1 Gray 325 (Mass. 1854); Schwartz, Lease Drafting in Massachusetts §§9.1 n.6 (1961).
6 1 American Law of Property §§57 (Casner ed. 1952).
7 Ibid.
8 Wallace, Assignment and Sub-Lease, 8 Ind. L.J. 359 (1933).
9 Salmond, Jurisprudence §158 (3d ed. 1910).
10 1 American Law of Property §§57, p. 299 (Casner ed. 1952).
11 See Wallace, Assignment and Sub-Lease, 8 Ind. L.J. 359 (1933).
§1.6  PROPERTY AND CONVEYANCING

The grounds that the instrument of transfer evidenced an intent to create a sublease without thereby prejudicing the lessor.

It is interesting to note that the original lease in the Lebel case explicitly permitted subletting. Where the lease prohibits an assignment, but is silent as to subletting, the majority of courts will permit a sublease since forfeiture clauses are strictly construed. Although Massachusetts is probably in accord with this view, there is as yet no clear-cut holding to that effect in this state.

§1.5. Option to renew and extend lease. There is a definite split of authority as to whether there are any legal differences between an option to renew a lease and an option to extend a lease. There are at least three different views on the subject. The Massachusetts view is that an option to renew requires that a new lease be executed before the option is deemed to have been exercised, while an option to extend is deemed to have been exercised by the lessee's merely giving notice of his intent to extend the lease. The majority of courts hold that it is a question of interpretation and of fact as to what the parties intended and presume that in the absence of any express intent to the contrary, ordinarily no new lease is needed to exercise the option (a notice to exercise the option suffices), since the parties do not want to burden themselves with the need for executing a new lease. A third view is that there are no substantive differences between the two.

In the Lebel case, the Supreme Judicial Court was confronted with the unique question as to whether an option "to renew and extend" requires that a new lease be executed before the option is deemed to have been exercised or whether the giving of notice of an intent to extend suffices. The Court, in Lebel, concluded that a new instrument was not needed, since "[t]he parties reasonably showed an intention that a notice should be sufficient to extend the term." Although it is doubtful that the parties "reasonably" expressed their intent with such ambiguous terminology, nevertheless the result reached may be sustained as a judicial attempt to limit the harsh Massachusetts rule requiring a new instrument to those situations in which the parties unequivocally express such an intent.

§1.6. Adverse possession and prescription. The annual reports are

12 See American Law of Property §3.58 (Casner ed. 1952).
17 Although Schwartz, Lease Drafting in Massachusetts §5.17 n.7 (1961), cites Watriss v. National Bank of Cambridge, 124 Mass. 571 (1878), as involving an option to "extend or renew," the option there was also phrased in the conjunctive. However, in the Watriss case, the Court did not decide how such an option is exercised, since the lessee conceded the point. 124 Mass. at 574.
19 Ibid.
usually replete with interesting adverse possession cases. The 1961 Survey year is no exception.

In *Cerel v. Town of Framingham*, the question of whether a town can acquire title to realty by adverse possession was presented to the Supreme Judicial Court. The locus was outside the territorial limits of the town. The Court held that the town had not acquired title by adverse possession, since the acts of disseisin were not the corporate action of the town.

In the course of its opinion, the Court stated that it was established law that a town may acquire title to realty within its limits by adverse possession. The Court assumed, without deciding the point, that a town could acquire title to realty outside its territorial limits by adverse possession. Insofar as a governmental unit is subject to being sued in tort for its trespasses, there would appear to be no reason for treating such a unit differently from a private individual. But if the governmental unit enjoys tort immunity, there would appear to be analytical difficulties present in permitting a town to acquire title by adverse possession. The typical statutory provision pertaining to adverse possession bars an action to recover land unless an action is brought within a stipulated period of time after "the right of action or of entry first accrued." If a town is not subject to tort liability, how can it be said that a cause of action has accrued which would cause the statute of limitations to start running? The rule permitting a governmental unit to acquire title by adverse possession has been rationalized on the grounds that a cause of action accrues against the agents of the town. This rationale seems to bring into question the requisite that the action of the agent be official corporate action. What is so magical about corporate action if the town is not liable in tort for the acts of the agents? The Court, in the *Cerel* case, does not definitely spell out the elements of corporate action, since there was a specific finding in the lower court that there had been no corporate action.

Another interesting adverse possession case decided during the 1961 Survey year was *Flynn v. Korsack*. The issue presented was whether the plaintiff had acquired, by prescription, a right of way to drive a car over a strip of the defendant's land which extended along a driveway between the adjoining properties. One of the plaintiff's predecessors in use, whose use the plaintiff was tacking to his own and others, in order to gain the prescriptive right, testified that: "She never thought anything about driving in over it" and "by looking she could not determine where the end of the property line could be" and "she didn't do it deliberately." In holding that this was an adverse use, the Court adhered to its policy of liberally interpreting the requisite that

---

2 342 Mass. at 20, 171 N.E.2d at 842.
3 G.L., c. 260, §21.
4 4 Tiffany, Real Property §1154 (3d ed. 1939).
§1.7 PROPERTY AND CONVEYANING

the adverse use be under a “claim of right.” This would appear to be a sound approach, since the Court thereby avoids the uncertainties of determining the state of mind of the user. Furthermore, a contrary result would give a conscious wrongdoer greater protection than an honest adverse user. In addition, inasmuch as a cause of action accrues in favor of the owner of the locus despite the user’s mistake, innocence, or lack of malice, the user should gain prescriptive rights.

The case of Kershaw v. Zecchini, decided during the 1961 Survey year, is also of interest because of its novel facts. The predecessors in interest to the adverse possessors in this litigation were circus performers who used the locus for the purpose of exercising and practicing stunts. The lot in question had previously been unimproved land. The circus performers cleared the land and put in boundary marks. Occasionally, the circus performers went away on circus trips. The Supreme Judicial Court held that, on these facts, a finding by the lower court of adverse possession was justified.

§1.7. Indefinite references. In Mishara v. Albion, the plaintiff sought to recover a sum paid as a deposit under a purchase and sale agreement on the grounds that the defendant-seller was unable to convey a marketable title. The issue of marketability hinged upon the effect of an administrator’s deed in the chain of title, recorded on November 22, 1926, which contained a clause reading, “said conveyance being further subject to any and all easements and restrictions lawfully existing in, upon or over said land or appurtenant thereto,” and did not limit the easements and restrictions to those “of record.” The lower court found for the plaintiff-buyer for the deposit and interest. On appeal, the Supreme Judicial Court sustained the defendant-seller’s exceptions to the trial judge’s rulings.

First of all, the Court held that the trial judge erred in placing the burden of proof on the seller. Although the proof of an indefinite reference in the record may then shift the burden of going forward with the evidence to the seller (who then must specifically negate the existence of the interest referred to), the burden of proof is not shifted from the buyer who seeks the recovery of the deposit. Furthermore, the trial judge erred in requiring proof beyond a reasonable doubt. Although the test of marketability is whether the title is good beyond a reasonable doubt, the state of title (good or not good beyond a reasonable doubt) is to be proven by a fair preponderance of the evidence.

Secondly, the Court held that the trial judge erred in ruling that the title was unmarketable. The reference, both factually and perhaps as a matter of law as well, did not affect the land’s marketability.

8 §15.5 (Casner ed. 1952).

Inasmuch as thirty years had elapsed without anyone having received notice of any restrictions and without anyone having attempted to enforce any such restrictions, the likelihood of anyone having an easement or the benefit of a restriction by an unrecorded deed was remote. Furthermore, since it was an administrator’s deed, the Court presumed that the administrators, being fiduciaries, would not have created such interests and, if they had knowledge of any such interest, would have expressly referred to them. The Court concluded that the administrators intended only to refer to restrictions and easements of record.

Section 25 of G.L., c. 184, may not have been applicable to this case because the facts arose before the effective date of that act. The title would have been deemed marketable as a matter of law under that statute even though the administrator’s deed was construed as referring to unrecorded interests. Section 25 provides:

No indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest, nor be a cloud on or otherwise adversely affect the title of any person acquiring the real estate . . . if he is not otherwise subject to it or on notice of it.

A recital that realty may be subject to an unrecorded easement and restriction is classified as an indefinite reference.

§1.8. Accretion. When land adjacent to water is enlarged by the accumulation of deposits of soil upon the land, the landowner is usually entitled to these additions under the doctrine of accretion. At least five justifications have been offered for this rule:

1. It is desirable to assure the adjacent landowners access to the water.
2. The addition belongs to the landowner because it is usually “de minimis.”
3. The landowner is treated like a tree owner and the additions are treated like fruit to which he is entitled.
4. The landowner is allowed the additions in exchange for the risk of loss by erosion.
5. The adjoining landowner is deemed to acquire title in order to avoid an uncertainty as to ownership. All land should have an owner.

In Michaelson v. Silver Beach Improvement Assn., the Supreme Judicial Court was concerned with an interesting accretion case. The plaintiffs were owners of contiguous lots bounded on the west by Wild Harbor. Since some time prior to 1949, a sea wall protected their

4 Powell, Real Property §983 (1958).
5 Blackstone, Commentaries *376 (Gavit ed. 1941).
6 City of St. Clair v. Lovington, 90 U.S. 46, 23 L. Ed. 59 (1874).
§1.9 PROPERTY AND CONVEYANCING

property. Even at the lowest tide, the water came up to the wall. In the spring of 1950, the state public works department, by dredging and pumping sand from the floor of the harbor, caused sand to be cast against the sea wall. In fact, a beach was formed from the sand cast in this manner. The plaintiffs claimed that this was their own private beach and not a public beach. The Court sustained the plaintiffs' contentions. The Court treated this as an ordinary accretion case even though the additions were substantial and were artificially caused. It stressed the fact that some of the justifications for the accretion doctrine were present. More specifically, it emphasized the plaintiffs' rights of access to the water and that the plaintiffs were constantly subject to the risk of loss by erosion (artificial and natural). Hence it held for the plaintiffs in the absence of proof of a public taking.

§1.9. Joint tenancy or tenancy in common. Assume that O conveys Blackacre to “A, being unmarried, and H and W, his wife, as joint tenants and not as tenants in common.” H and W hold, as between themselves, as tenants by the entirety.1 But does A hold as a tenant in common with H and W or as a joint tenant with them? The words “as joint tenants and not as tenants in common” may be applicable to all three grantees or only to H and W. In Fulton v. Katzowney,2 the Supreme Judicial Court held that the deed conveys a one-half interest to A in the property to be held as tenant in common with H and W. Inasmuch as the deed was ambiguous, the Court was compelled to rely upon the statutory presumption in favor of tenancies in common.3 Hence, if it is the desire of the conveyance to create a joint tenancy in such circumstances, the intent to do so should be explicitly manifested.