Chapter 1: Property and Conveyancing

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PART I

Private Law

CHAPTER 1

Property and Conveyancing

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§1.1. Dower and curtesy: Restricted to interests owned at death. During the 1965 Survey year, the legislature amended the statutory provisions pertaining to dower and curtesy.1 The changes effected are of consequential import and will have far-reaching practical and societal ramifications. As a result of this statute, dower and curtesy claims may only be satisfied out of land owned by the deceased spouse at the time of death. In addition, any encumbrances on the land at the time of the spouse's death have precedence over dower and curtesy.2

At common law, these marital estates were protected, from their inception, against impairment by the spouse-owner. Thus, if the spouse-owner conveyed or mortgaged realty to which these rights had attached during coverture, the surviving spouse's right was not destroyed unless he or she released it or joined in the deed.2 As a practical matter, this meant that land could not be conveyed or mortgaged unless the non-owner spouse joined in the instrument of transfer and released his or her marital estate. This statute may have an ameliorative effect in the situation where the nonowner spouse is recalcitrant (owing perhaps to marital difficulties) and refuses to join in the transfer. It will also have the long-range effect of making land titles more marketable.

There is a definite statutory trend toward the modification and curtailment of dower and curtesy.3 One commentator has suggested that these alterations proceed from the convictions that these marital

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§1.1. 1 G.L., c. 189, §1, as amended by Acts of 1965, c. 165. See also §4.8 infra.
2 See 1 American Law of Property §§35.32, 35.61 (Casner ed. 1952).
3 See 2 Powell, Real Property §§217, 218 (1950); Walsh, Commentaries §§110, 114 (1947); Van Roden, Rights of Surviving Spouse to Share in Assets Transferred by the Decedent in his Life Time, 58 Dick. L. Rev. 70 (1953); Note, 40 Geo. L.J. 109 (1951).
estates do not provide adequate protection for the surviving spouse and that it is unfair to give unqualified priority to these marital estates over creditors of the deceased spouse. The present statute appears to be premised on the latter of these two rationales and upon a continuation of the legislature's quest for greater title certainty and marketability.

This statute becomes effective on January 1, 1966. It will be operative even in the situation in which the spouses were already married to each other at the time of the enactment of the statute. This would not seem to raise any questions of constitutionality, since these marital estates, prior to the owner-spouse's death, are not vested or so substantial as to be immune from statutory destruction.

§1.2. Termination of a tenancy by the entirety by divorce. Subsequent to the decision in Bernatavicius v. Bernatavicius, it was assumed that as a result of a divorce, a tenancy by the entirety was converted into a tenancy in common. In that case, the Court speaking through Chief Justice Rugg stated:

It seems to us more in harmony with the principles governing such tenancies to hold that they cannot continue after the tenants have become divorced and thus have ended the legal relationship to each other, which constitutes the essence of that tenancy.... "Joint tenancy and its doctrine of survivorship are not in harmony with the genius of our institutions nor are they much favored in law...." These considerations lead us to the opinion that the operation of a divorce of the parties upon a tenancy by the entirety creates a tenancy in common.

In Finn v. Finn, the Court clarified its holding in Bernatavicius and reduced the rule announced in that case to a rule of construction. In Finn, a corporation issued capital stock to a husband, H, and his first wife, W-1, "as joint tenants with right of survivorship and not as tenants in common." Consistent with prior precedents, the Court concluded that H and W-1 held the stock as tenants by the entirety. All of the shareholders of the corporation and the corporation itself entered into a stock purchase agreement which provided that: "In the

6. See 2 Powell, Real Property §219 (1950); 2 Tiffany, Real Property §533 (3d ed. 1939); Annotation, 20 A.L.R. 1350 (1922).
8. 1 Lombard, Marriage and Divorce Laws of Massachusetts §580 at 717 (3d ed. 1949).
event of the death of a Husband-Stockholder, the Company shall pur-
chase from his present wife (if she shall survive him) or from his estate
(if his said wife shall have predeceased him), and she or it, as the case
may be, shall sell to the company . . . all shares of the Company owned
by him and/or his said wife at the time of his death.” [Emphasis sup-
pplied.] The agreement also provided that the stock certificates were
to be endorsed with a legend stating that they were subject to the terms
of the agreement. H and W-I were subsequently divorced. Incorporated
into the divorce decree was a property settlement agreement which
provided that “nothing herein contained shall be deemed or con-
strued to affect, impair, modify, alter, amend, release or waive any
rights” of W-I under the terms of the stock purchase agreement relat-
ing to shares of stock “now owned by said Husband and Wife as joint
tenants with rights of survivorship and nothing herein contained shall
be deemed or construed to affect, impair, modify, alter, amend, release,
or waive her ownership of said shares of stock.” Shortly after the issu-
ance of the divorce decree, H married W-2. H died a year after marry-
ing W-2, and litigation then ensued as to who was entitled to receive
the purchase price of the stock pursuant to the terms of the stock pur-
chase agreement.

W-2 claimed the purchase price on the premise that she was the
“present wife” referred to in the stock purchase agreement. The Court
disposed of W-2’s claim on the basis that the stock purchase agreement,
coupled with the property settlement, established “beyond doubt” that
the phrase “present wife” referred to the marital relationship existent
at the date the stock purchase agreement was entered into. With re-
spect to the conflicting claims of W-I and H’s estate, the Court held
that W-I was entitled to the entire purchase price since the divorce
decree, by incorporation of the property settlement agreement, pro-
vided that W-I’s “ownership” of the stock held by her and H “as joint
tenants with rights of survivorship” was not to be affected. The Court
concluded that the tenancy by the entirety was converted, by the
divorce, into a joint tenancy.6 It distinguished Bernatavicius on the
ground that the divorce decree in that case made no disposition of
the property of the parties.

The Finn decision leaves a number of questions unanswered. Joint
tenancies may be severed7 and it has been suggested that following the
divorce, either of the former spouses could have unilaterally severed
the joint tenancy and converted it into a tenancy in common.8 Yet,
might it not be plausibly contended that the parties intended that
W-I’s rights were not to be impaired by any such unilateral action?
In addition, although this case holds that the rule promulgated in
Bernatavicius is only a rule of construction, presumably the Court will

6 It could not continue to be a tenancy by the entirety since the spousal unity
ceased with the divorce. See 4 Powell, Real Property §624 (1965 Recompilation).
hold that a tenancy in common is created when no contrary intent is manifested. The Court would then have to decide what the specific fractional shares of the spouse were.9

§1.3. Defects in the record: Errors in indexing. When a grantee or mortgagee in a senior instrument promptly files it with a recording officer, and the recording officer then fails to properly index the document, the recording officer's error may result in a conflict between the grantee or mortgagee under the senior instrument and a bona fide purchaser or encumbrancer under a subsequent instrument. There is a division of authority as to where the risk of loss falls and as to which party is relegated to pursuing a remedy against the recording officer.1 To a considerable extent, the divergence of results is explicable in terms of the variations in the statutory language of the recording laws of the different states.2

In the leading case of Sykes v. Keating,8 the Supreme Judicial Court cast the risk of loss upon the subsequent purchaser. In that case, which involved an attachment of real estate which had been fraudulently conveyed, the clerk failed to enter in the attachment book the name of the person in whom the record title stood (as required by statute). The holder of the record title, subsequent to the attachment, conveyed the premises to a purchaser for value. The Court held for the attaching creditor and stated that: “When the officer has deposited the writ or copy, he has done all which the law requires him to do in order to make a valid attachment. The clerk is in no sense the agent of the officer or plaintiff, and his failure to make the records according to the directions of the statute will not defeat the attachment.”4

The United States Court of Appeals for the First Circuit applied the rule enunciated in Sykes v. Keating in the recent case of Trager v. Hiebert Contracting Co.5 In Trager, X sued Y in the United States District Court for the District of Massachusetts for breach of contract. X instructed the United States Marshal to make an attachment of Y’s land in Essex County. The marshal deposited a certified copy of the original writ of attachment in the Essex Registry of Deeds. In addition, he filed a return which was a general attachment of all of Y’s land located in the county. Unfortunately, he added the following words to his return, “And I levied this Execution thereupon.” This addition was erroneous since the original document (and copy) was an attachment, and not an execution. The registry clerk then proceeded to index the document as an execution and not as an attachment. He further compounded his error by adding a statement in the index

9 See McLaughlin, Divorce and the Tenancy by the Entirety, 49 Mass. L.Q. 45 (1965).

§1.3. 1 See Annotation, 94 A.L.R. 1303 (1955).
3 118 Mass. 517 (1875).
4 Id. at 519-520.
5 339 F.2d 530 (1st Cir. 1964).
that it related to land in Marblehead (located in Essex County). Subsequent to the commission of these errors, P acquired an interest in some land in Peabody (located in Essex County) in which Y had a record interest. P intervened in the federal court action under Rule 24(a)(3) of the Federal Rules of Civil Procedure, alleging that he wished to dispose of his property; that the attachment constituted a cloud on his title; and that the attachment ought to be dissolved.

P contended that the index gave him no notice of an attachment of land in Peabody and hence, as a subsequent purchaser for value, he ought to prevail. The court, however, adhered to *Sykes v. Keating* and held that an error in indexing at the registry does not invalidate the attachment and that the loss falls on the subsequent purchaser. In response to P’s contention that the marshal failed to comply with the statute since he added the phrase, “And I levied this Execution thereupon,” to the return, the court held that this was not a case of the marshal filing an incorrect copy of the writ, or an incomplete return. Rather, the court concluded that the addition of this manifestly and patently erroneous description on the face of the document could not destroy compliance with the statute.

§1.4. Partition: Any part of the land. In *Jefferson v. Flynn*, P filed a petition for partition alleging that he held as tenant in common a 14/45 "undivided part or share" of real estate and listed thirteen other tenants in common holding various fractional interests, some very small. P prayed that a sale or conveyance be made of all or any portion of the land which could not be advantageously divided. D, who was not named as a respondent in the petition, filed an answer in opposition alleging that he held title to the premises. The probate court entered a decree appointing a commissioner to sell and convey the 14/45 interest at public auction and directing the commissioner to pay over the net proceeds of such a sale to P. Apparently, the probate judge was attempting to follow a statute which provides: "In partition proceedings the court may order the commissioners to sell and convey the whole or any part of the land which cannot be divided advantageously...." [Emphasis supplied.]

On appeal, the Supreme Judicial Court reversed the decree. It held that the decree did not make partition but sought to remove P, doubtless at a financial sacrifice, from ownership of his undivided interest in favor of whoever should buy it at auction . . . . The decree as made merely enables changing the name of one of the owners. The land will continue to be owned in the same proportions as before the petition. The phrase "any part of the land" means a specific physical part, not any share or interest in an undivided fraction of the real estate. 8


2 G.L., c. 241, §81.


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The result reached by the Court is in accord with the decision in *Roberts v. Hagan*, a Virginia case. In that case, the sale of the interest was deemed void even though the purchaser subsequently acquired all the interests in the land.

§1.5. Creation of interests by reference to boundaries. When a conveyance of land describes the conveyed parcel as being bound by a street, or refers to a map on which spaces for streets or ways are shown, and the grantor owns the street or the spaces on the map, two interests may be created in favor of the grantee in the street or the map-shown spaces. First of all, the grantee may be deemed to have acquired an easement with respect to such street or space. The Massachusetts rule on the subject has been stated by Justice Spalding as follows:

... when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee. (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed.

Although the Massachusetts opinions speak of this easement as being created by "estoppel," one authority has suggested that the easement exists because of the "combined effect of a peg-phrase in the conveyance and of the circumstances of the conveyance." Thus, it may be more accurate to say that this easement arises by "implication." There are some indications that the principle stated has become a rule of law in Massachusetts rather than a mere canon of construction. The rule is applicable even though the way is not yet in existence and even though the street or space is defined in a plan filed by another person (other than the grantor), as long as the grantor's deed refers to the plan. The second interest which may be created by such a description is a fee to the center line of the bounding street or way. In Massachusetts, there is a rule of construction that a fee to the middle of the street or way was given to the grantee.

Both of these rules were recognized in the recent case of *Murphy v. Mart Realty of Brockton, Inc.* In that case, the disputed strip in question was a proposed street which appeared on a plan recorded by

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4 121 Va. 573, 93 S.E. 619 (1917).
5 See Goldstein v. Beal, 517 Mass. 748, 755, 59 N.E.2d 712, 715 (1945) (where on the facts of the case the rule was not deemed applicable).

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one of the original grantors (the grantors were married to each other). The various deeds out described the conveyed parcels as being bounded westerly by the proposed street as shown on the plan. The Court held that the grantees had acquired a right of way appurtenant to the land conveyed, but that the grantees had “overloaded” the easement in using the way to gain ingress and egress to and from other land adjacent to or beyond that to which the easement was appurtenant. It also held that the presumption in favor of the creation of a fee to the middle of the strip had not been overcome. The Court remanded the case for further findings whether the activities of the owners of the dominant tenement of filling in, grading, and blacktopping the strip were reasonable and done with due regard for the rights of the owner of the servient estate.\textsuperscript{10}

\textbf{§1.6. Easement by prescription: Tacking between landlord and tenant.} Successive periods of adverse use may be tacked and added together to make up the required period of prescription, if there is privity between the successive users.\textsuperscript{1} The problem of “tacking” is complicated considerably when there is a landlord-tenant relationship. In this situation, it is generally said that the tenant cannot prescribe in favor of himself because of the “imbecility of his estate.”\textsuperscript{2} As far as prescription in favor of the landlord is concerned, the presence of privity between the landlord and the tenant is held to permit prescription by adverse use by the tenant in favor of the landlord, if the landlord evidenced a claim of right to all easements which the tenant was expected to use.\textsuperscript{3} In the case of \textit{Ryan v. Stavros},\textsuperscript{4} the Court permitted a tenant who subsequently purchased the property to tack on periods of adverse use made by the tenant himself in his capacity as tenant so as to enable him to gain an easement by prescription.

In that case, O-1 adversely used the area in dispute from 1939 to 1945. In 1945, O-1 sold land adjacent to the area in question to O-2. About a month later, O-2 leased this land to T who continued the adverse use of the disputed area. In 1949, O-2 sold this land to T. The Court held that O-2 had evidenced a claim of right to all easements which T was expected to use; hence, T’s adverse use inured to the benefit of O-2. In turn, when O-2 sold the land to T, T became O-2’s successor in interest, thus completing the chain of privity with regard to the adverse use.

The Court also held that the owner of the servient estate had not effectively interrupted the running of the prescriptive period. The


\textsuperscript{1} 2 American Law of Property §8.59 (Casner ed. 1952); 3 Powell, Real Property §413 (1952); 4 Tiffany, Real Property §1207 (3d ed. 1939).


owner of the servient estate had placed "horses" in the driveway area in dispute for a few hours on two occasions when the dominant premises were closed anyway. Rather than interrupt the running of the prescriptive period, such an ineffective protest may actually strengthen the evidence of adverse use.6

§1.7. Obsolete restrictions. In 1961, the legislature continued its quest for greater title certainty and marketability by enacting a statute designed to curtail the enforceability of obsolete restrictions.3 Sections 10A to 10C of the General Laws, Chapter 240, authorize a proceeding in equity whereby a landowner may receive a judicial determination that a restriction upon his land is or is not 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.2

Walker v. Sanderson,8 decided during the 1965 Survey year, is (to the author's knowledge) the first case decided by the Supreme Judicial Court involving the application of this statute. In that case, an action was brought to determine the enforceability of a restriction reading as follows:

The premises are conveyed . . . subject to a permanent restriction that no part of the premises shall be used for any business except for raising, growing and selling live bait and the sale at retail of fishing tackle and sporting goods, and the grantees . . . agree . . . not to use the premises or any part thereof in violation of the above restriction, and it is agreed this covenant shall run with the land.

At the time the restriction was imposed in 1947, the land was covered to a large extent by a lake. The lake was popular for fishing and for fly-casting and was used by many fishermen in the area. The land was purchased for the purpose of operating a bait shop to sell bait and fishing equipment to the numerous fishermen who used the lake on the property. In 1961, the city of Waltham constructed a new road through the premises in order to improve the traffic flow from Route 128. In the process of building the road, it was necessary to fill in a substantial portion of the lake so that now only a small brook runs along the property. The lake has disappeared and with it the bait shop which once serviced it. In addition, the city has, since 1947, zoned a limited area around the premises as a "Business-A Zone." The lower court decreed that the restriction was obsolete and inequitable to enforce because changes "in the character of the properties affected and the neighborhood and the surrounding conditions and circum-

6 See 3 Powell, Real Property §413 (1952); 4 Tiffany, Real Property §1205 (3d ed. 1939).

1 G.L., c. 240, §§10A-10C.
stances reduce materially the need for the restriction or the likelihood of the restriction accomplishing its original purposes..."4 The lower court found that the purpose of the restriction was to keep out activities that would interfere with the use of the lake as a picnic area, fishing ground, and a tournament location for fly-casting. "With the going of the lake that purpose need no longer be executed."5 The lower court did concede, however, that if the "purpose of the restriction had been found to be to preserve the residential quality of the neighborhood then damages have been shown..."6 On appeal, the Supreme Judicial Court reversed the decree below and found that the restrictions had the purpose of preserving the residential character of the neighborhood, except for the limited business use specified. The Court found that the restriction was designed for the benefit of the grantor's other adjacent land and that since the pond was entirely within the restricted tract no interest of the grantor in maintaining a bait and fishing business on this tract could be inferred from the restriction. Although the grantees purchased for the purposes of the business specified, this fact was immaterial since the restriction was not for their benefit. The lower court's conclusion was based upon its construction of the purpose of the restriction. In light of the fact that the purpose of the restriction was to preserve the residential character of the neighborhood, and since only a limited area had been zoned for nonresidential purposes, the Supreme Judicial Court held that the restriction was enforceable and was to be observed.

When Chapter 240, Sections 10A to 10C, of the General Laws was enacted, the author questioned the constitutionality of this statute.7 Although the respondents did challenge the constitutionality of the statute in their brief,8 the Court refrained from passing on this question. The Court's action may be justified on the basis that it disposed of the litigation by finding for the respondents on nonconstitutional grounds.

4 Record 20-21.
5 Id. at 17-18.
6 Id. at 18.
7 See note 2 supra.
8 Brief for Respondents, Part III.