Chapter 4: Property and Conveyancing

William Schwartz
CHAPTER 4

Property and Conveyancing

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§4.1. Equitable servitudes. Prospective purchasers of lots in a development area may wish some assurance that there will be some degree of uniformity of style in the houses erected in the development area. In an effort to accommodate the objectives of such prospective purchasers and to thereby promote their development schemes, some developers have reserved the right to approve their grantees' building plans.

This approach was taken by the developer in *Donoghue v. Prynwood Corp.*,¹ decided during the 1970 Survey year. In *Donoghue*, the deeds from the developer, defendant corporation, contained the restriction that the finished plans of any proposed house had to be approved by the developer. In most of the deeds, but not in the deed to plaintiff, one of the purchasers, there appeared a provision that the developer "reserves the right to amend these restrictions from time to time and . . . the right to waive compliance with these restrictions in any instance."

The development area (consisting of 45 lots) was located near a country club, and all of the lots in the area had been sold. Houses had been erected upon all but three lots. Defendant corporation still owned some adjacent vacant land. A real estate agent informed plaintiff (when plaintiff made a deposit toward the purchase of the locus) that the deed would contain the aforementioned restriction and that, since the locus adjoined the country club, the developer preferred "a one-story house on [the locus] so that [other] houses . . . which were two-story, would have an unimpaired view of the [club]." X was the sole stockholder and principal officer of defendant corporation and in "complete control of its affairs." X was experienced in real estate matters. Plaintiff gave the agent (who showed it to X) a "rough penciled sketch" of the house which plaintiff proposed to build. After the closing, plaintiff engaged an architect who had won many awards for design to draw plans and to prepare a model of the house to be built. The projected cost was at least $130,000. The plans called for a modern one-story, square-shaped, flat-roofed house.

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X declined to approve the plans primarily because he objected to
the flat roof. He admitted that, "while he did not like the plans, he
would approve them except that some of the neighbors vehemently
objected to the proposed structure." There was no uniformity of style
in the houses erected. All but that on the locus were "of traditional
or conventional styles, with the exception of two, which might be
classified as modern." Plaintiff's proposed house would not have de-
preciated the value of any other house in the development, nor would
it have been detrimental to the neighborhood. It was stipulated that
X had not enforced similar covenants against others.

Plaintiff sought declaratory relief in probate court. When the case
was heard, there had been no appreciable construction on the locus.
It was stipulated, however, that before defendant corporation moved
to amend its answer to request a permanent injunction against con-
struction, plaintiff had expended at least $34,256.07. A preliminary in-
junction against further construction by plaintiff had been denied to
defendant corporation about six months before the corporation first
moved to request the permanent injunction. The probate judge re-
ported the case without decision. At the date of the report, the house
had "been substantially fully erected and landscaped."

The Supreme Judicial Court held that the right of approval had to
be exercised "objectively, honestly, and reasonably" and that X had
acted arbitrarily. It relied upon the findings that (a) two other houses
"might be classified as modern," (b) "the proposed house will not . . .
be detrimental to the neighborhood," (c) X would have approved the
plans except for the objections of the neighbors (whose houses were
not depreciated in value), and (d) X had not enforced similar
covenants against others. Although plaintiff unwisely took certain
risks in proceeding to build before obtaining defendant's approval or
judicial relief, the Court held that plaintiff's conduct was excusable
because of defendant's unreasonable refusal to approve. The Court
concluded that defendant corporation unreasonably refused to ap-
prove plaintiff's plans, and that such approval no longer may be re-
quired.

In reaching the above conclusion, the Court balanced the harm to
plaintiff, if forced to remove the costly house he had constructed, solely
against possible damage to defendant corporation. The Court noted
that the restriction was potentially enforceable only by the corpora-
tion and not by the other purchasers of lots in the development. This
is an outgrowth of the decision in *Patrone v. Falcone*.2

In *Patrone*, the grantor imposed the following restriction in his
deed out:

Said land is conveyed subject to the following restrictions unless
released by the grantor, his heirs, or assigns: No building shall be
erected, placed, or maintained thereon other than one detached

dwelling house for the occupancy of one family, and appurtenant buildings. The design and location on the premises of any dwelling, buildings, fence, sign or other structure or device appurtenant thereto must be approved by the grantor, his heirs or assigns before construction thereof is begun.3

The common grantor had conveyed one lot to X in 1950, and X conveyed the lot to defendant in 1956. Plaintiff acquired his lot from the grantor in 1953. By 1955, the grantor had sold all of the lots in the development. In 1960, defendant commenced the construction of a two-car garage on his lot and plaintiff brought suit to enjoin defendant from proceeding with the building of the garage.

The Supreme Judicial Court concluded in Patrone that:

... the language of the restriction and reason compel the conclusion that the right of approval was intended to be exercised only by the grantor, his heirs, or assigns. A contrary construction would place an extremely onerous burden on each lot owner in the development .... It seems to us highly unlikely that the common grantor could have intended by implication to give this power of approval, which involves matters of personal taste and discretion, to each of the grantees in the development. Unless all the other lot owners were in agreement on the matter of location and design — which would be highly unlikely — a lot owner would be unable to erect a structure on his land.4

This approach is consistent with the presumption that restrictions are personal and not appurtenant to the land.5 The rationale for this presumption is that a multiplication of the parties entitled to enforce a restriction tends to impair the alienability of land.6 It can be plausibly urged that the breadth of this restriction, pertaining as it does to design and location, justifies the invocation of this presumption.

The impact of Patrone was that the protective purposes of such a restriction are obtainable only as long as the common grantor has not sold all the lots in the development. During that interval, at least, the grantor could compel compliance with the restriction. Once all the lots have been sold, it would appear that even the common grantor might be precluded from enforcing the restriction, unless, as the instant decision intimates, he has retained title to some adjacent land.7 The instant decision further erodes the protection afforded by

3 Id. at 660, 189 N.E.2d at 229.
4 Id. at 663, 189 N.E.2d at 231.
6 Ibid.
this restriction in holding that the restriction must be exercised “ob-
jectively, honestly, and reasonably.”

In *Donoghue*, the Court leaves open the question of whether the
grantor’s right of approval would be similarly limited if the restric-
tion contained explicit language reserving an absolute and uncon-
trolled discretion in the grantor.\(^8\) While the breadth of such language
might result in the grantor having greater discretion, such a wide-
reaching restriction would, a fortiori, not be enforceable by other
purchasers.

As it did in *Patrone*, the Court refrained from determining whether
the reservation by the common grantor of a power to release the re-
striction negatives an intention that the restriction was to be appur-
tenant to the land. The weight of authority in the United States
appears to hold that a reservation of such a power by the grantor
negatives the purpose of uniform development from which the right
of other grantees to enforce the restriction is deemed to arise.\(^9\) In
England, however, a grantee may enforce a restriction if it appears
that there is a uniform building scheme, and that the grantor’s con-
sent has not been obtained.\(^10\)

It is interesting to note that the Court relied, to some extent, upon
the fact that X had not enforced similar covenants against others.
Some courts have held that the common grantor cannot proceed in a
discriminatory manner so as to enforce a restriction, on a selective
and individual basis, against one lot owner while waiving enforce-
ment against other lot owners.\(^11\) This issue had been presented to the
Court in an earlier case,\(^12\) but the Court did not find it necessary to
resolve the question.

**§4.2. Formalities of conveyances.** In recent years, the Massa-
chetts legislature has been concerned with strengthening the deed’s
capacity to serve as a source of information pertaining to the parties,
the consideration for the conveyance, and the premises conveyed. In
1967, the legislature put some teeth into G.L., c. 183, §6, which re-
quires that every deed contain the full name, residence, and post office
address of the grantee, by adding a provision that the register of deeds
should not accept a deed for recording unless it is in compliance with
this requisite. In 1969, the legislature rewrote the section so as to
also require that the full consideration for the deed be recited therein.
In the 1970 Survey year, the legislature continued this pattern of

\(^10\) See Osborne v. Bradley, [1903] 2 Ch. 446; Elleston v. Reacher, [1908] 2 Ch. 665.
\(^11\) See Wedum-Adahm Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937); 
requiring a more complete disclosure by adding the following requisite:

No instrument conveying unregistered land shall be accepted for recording unless (a) the instrument indicates that the land conveyed is the same as described in or conveyed by prior recorded instruments identified sufficiently to locate the place of recording within the registry, or states that the instrument does not create any new boundaries, or (b) the instrument identifies the land conveyed either by reference to a plan or plans previously recorded in the same registry of deeds and identified sufficiently to locate the place of recording therein, or by reference to a plan or plans recorded with the conveyance. Failure to comply with this section shall not affect the validity of any instrument.¹

It would appear that the statute does not effect a wide-reaching change in the situation where the grantor seeks to convey the entire locus to which he has title. In such circumstances, it would appear that the statute may readily be complied with by a simple recitation that the instrument does not create any new boundaries (and without the necessity of referring to prior recorded instruments). However, if the grantor purports to convey less than the entire locus to which he has title, the practical effect of the statute may be that the deed must refer to a recorded plan.

This statute, like G.L., c. 183, §6, is ambiguous. Both provide that a defective deed shall not be accepted for recording. Both explicitly also provide, however, that noncompliance does not affect the validity of the instrument. It is unclear as to whether the statutory bar to the acceptance of a deed which does not comply with these requisites is merely a statutory mandate directed to the register and that, if the register nevertheless records a deed in violation of the statutes, it will still afford constructive notice, or whether the reach of the statutes is so broad as to affect the issue of constructive notice.

It is interesting to compare the language used in these statutes with the language employed in G.L., c. 183, §29. The latter statute provides: "No deed shall be recorded unless a certificate of its acknowledgment or the proof of its due execution . . . is endorsed upon or annexed to it . . . ." It has been held under this statute that an unacknowledged deed does not afford constructive notice.² There is a significant difference in language between the two statutes. Sections 6 and 6A refer merely to the register not accepting a deed, whereas Chapter 183, Section 29, explicitly bars recordation. It remains to be seen whether the courts will consider this change in language sig-

significant enough to demand a different result on the question of constructive notice.

In addition to the aforementioned legislative activity, the Supreme Judicial Court, on its own initiative, restated an important aspect of conveyancing which can conceivably be overlooked by laymen (and possibly by some lawyers). In Smigliani v. Smigliani, a deed, when delivered, named a husband and wife as grantees (who were to take as tenants by the entirety). Later, before recordation occurred, the names of the husband and wife were erased and another party was substituted as grantee. There was no evidence that the substitution of the grantee was made in the presence, or with the authority, of the grantor. The change was made because the husband had been involved in an automobile accident causing serious personal injuries. A real estate attachment related to that accident was made against the husband on the date of the delivery of the deed, with subsequent service of process. The Court held that the altered instrument was ineffective as a conveyance and that the husband continued to retain his undivided interest in the property. In reaching this conclusion, the Court relied upon Carr v. Frye for the following proposition:

When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate.

§4.3. Real estate tax exemptions. General Laws, c. 59, §5, grants an exemption from the real estate tax in the case of certain elderly persons who have satisfied the requirements of that statute. In construing this statute, the Supreme Judicial Court has been confronted with the choice of either applying the principle of strict construction of exemption provisions or of embracing the policy of protecting elderly taxpayers against financial exigencies. Prior decisions do not show a definitive philosophical trend or pattern in this area. This is revealed and evidenced by a trilogy of Massachusetts cases decided in 1965 and 1966.

In Board of Assessors of Everett v. Formosi, the taxpayers (husband and wife), as tenants by the entirety, owned a building consisting of two apartments and a store. The taxpayer-owners occupied one apartment as their domicile. The building was assessed for $7500. Section 5, clause forty-first, in relevant part, provided for an exemption "to the

4 Ibid.
5 225 Mass. 531, 114 N.E. 745 (1917).
6 Id. at 533, 114 N.E. at 745, citing Cheesman v. Whitemore, 40 Mass. (23 Pick.) 231, 234 (1839).
amount of four thousand dollars, . . . of a person who owns the [domicile] jointly with his spouse, either of whom is seventy years of age or over, and occupied by them as their domicile.” The assessors recognized the exemption only to the extent of one-third of the total assessed value on the ground that, when only a part of a parcel of real estate is used as the domicile of the elderly taxpayer, only a proportionate part of the total assessed value is eligible for the exemption. The Supreme Judicial Court affirmed a decision of the Appellate Tax Board which had reversed the assessors and had granted the full $4000 exemption mentioned in the statute. Justice Cutter distinguished a series of cases involving the charitable and religious exemptions under that statute. These cases had granted only a partial exemption when only a part of a parcel was used for the exempt purposes. Justice Cutter stated:

Those exemptions are based on what the Legislature had considered to be a desirable use, in the public interest, for a religious or a charitable purpose, and not primarily at least upon the financial status and needs of the owner. The exemption clause (§5, Forty-first), on the other hand, rests upon the financial exigencies of the elderly owner and his spouse, and in some degree resembles the exemptions given to certain deserving and needy veterans. The Court also relied upon the presence of clauses granting partial exemptions in other parts of the statute, and the absence of such a clause here.

The second case in the trilogy is Brease v. Board of Assessors of Peabody. In this case X had conveyed realty to Y, the deed containing the statement that “the grantor reserves the right to occupy the premises with the grantee during the term of his natural life.” General Laws, c. 59, §5, cl. forty-first, proviso (c), provided that “in the case of real estate owned by a person jointly or as a tenant in common with a person not his spouse, the amount of his exemption . . . shall be that proportion of four thousand dollars which the amount of his interest in such property bears to the whole value thereof . . . .” The majority of the Court construed the deed as reserving a life interest in X (for the life of X), as a tenant in common (during his lifetime) with Y, who also was deemed to be the owner of the remainder in fee simple. The majority also held that X’s concurrent life estate was a sufficient property interest to entitle him to the recognition of the exemption under proviso (c). In reaching this result, the Court, sub silentio at least, rejected other plausible constructions of the deed,

2 Id. at 729, 212 N.E.2d at 212.
3 Id. at 729-730, 212 N.E.2d at 211-212.
such as the notion that X had retained a mere license to use the premises. The Court explicitly rejected the suggestion that X had an estate pur autre vie for the life of Y. After having thus elevated X's interest to a concurrent life estate, the Court proceeded to interpret the phrase "real estate owned," used in proviso (c), as encompassing not only fee simple interests but also life interests. It is the author's opinion, however, that proviso (c) probably does not extend to non-freehold interests, such as tenancies for years.

The third case in the trilogy is Kirby v. Board of Assessors of Medford. In Kirby an elderly taxpayer transferred a parcel of real estate to a revocable inter vivos trust. The Court characterized the trust as being essentially a "dry trust" and assumed that the "trustee would not use the power of leasing or selling the house without Kirby's approval, while Kirby [the elderly taxpayer] continued able to give or withhold approval. In every beneficial sense, he was its owner." Although the Court recognized that, for many purposes, the settlor of a revocable inter vivos trust is deemed to have outright ownership of the res, it refused to sanction an exemption in this case on the ground that Section 5, clause forty-first, required not only ownership of a sufficient beneficial property interest but also ownership of a record legal interest. In the process of reaching this result, the Court abandoned the liberal and beneficent bent adopted in Formosi, and minimized the policy enunciated therein of protecting elderly taxpayers against financial exigencies. Instead, it applied the principle of strict construction of exemption provisions. The Court also relied upon the fact that Section 5, clause forty-first, made no reference to property held in trust, while Section 5, clause third, specifically exempted certain realty held in trust for a charitable organization.

In Board of Assessors of Cambridge v. Sebastiano, decided this Survey year, the Court adhered to the Formosi policy of protecting elderly taxpayers against financial exigencies. In this case, the taxpayers (husband and wife) acquired real estate on September 1, 1920, as joint tenants, and had occupied the premises ever since that date. On February 13, 1964, the taxpayers conveyed the property by quit-claim deed to their son, who was acting as a straw in order to facilitate an alteration in the form of legal ownership. That same day, the son executed a deed conveying the property to the taxpayers as trustees, and life beneficiaries, with full power to sell, lease, or mortgage the premises during their lives, or during the life of the survivor. On the death of both taxpayers, the trust was to be terminated and the property was then to be divided equally among the taxpayers' children.

8 Id. at 390, 215 N.E.2d at 102.
This deed, however, was not acknowledged until April 6, 1964, or recorded until May 1, 1964.

The Court held that the Kirby case was not controlling. It distinguished that case on the basis that the Kirby rule is applicable only where the taxpayer does not own the record legal interest. The Court also concluded that the brief interruption in continuous legal ownership did not destroy the exemption. The brief hiatus in legal ownership, which occurred during continuous occupation of the locus by the taxpayers and solely as a means to alter the form, but not the fact, of legal ownership, was insufficient to overcome the statutory purpose of ameliorating the financial exigencies of elderly taxpayers.

§4.4. Landlord and tenant: Concealed defects. At common law, the position of the lessee, members of his family, and his visitors was very bleak as far as any tort liability of the landlord for harm from defects in the leased premises was concerned. In the nineteenth century, landowners' economic interests were given paramount consideration. The courts of that period stamped approval of the lessor's tort immunity by adopting the root concept that a lease was a sale of the premises for a term. Such a "jurisprudence of conceptions" meant that the landlord was subject to no liability for leasing premises in a dangerously defective condition because the heartless rule of caveat emptor applied. An English judge succinctly summed up the dismal plight of the tenant and his family and servants at common law: "Fraud apart, there is no law against letting a tumbledown house."

In the last 90 years or so, there has been a discernible shift from the rule of lessor's immunity to an approach which makes the landlord primarily responsible for the safe condition of his premises, thus placing the duty of making repairs on the party better able to make repairs. Basic transformations in social and economic conditions led to a shifting of responsibility to the lessor by the adoption of exceptions to the common law "no duty" rules. The inroads on the lessor's immunity include: (1) concealed dangerous conditions known to the lessor; (2) conditions dangerous to those outside the premises; (3) premises leased for admission of the public; (4) the lessor's covenant to repair; (5) negligence in making repairs; (6) portions of premises retained in lessor's control; (7) statutes—frequently extended to multiple-unit dwellings—requiring lessors to keep premises in good repair. Smith v. Green, decided this Survey year, is concerned with the first exception to the lessor's immunity, a concealed dangerous condition known to the lessor.

This exception has, on occasion, been given a grudging and constrictive construction by the courts in the belief that overborne tenants were omniscient people, dealing at arm's length on a plane of legal parity, who might be expected to give the premises an intensive examination before renting them. In addition, in some jurisdictions, the rule that a landlord must have actual knowledge of the danger still obtains. There is, however, a growing tendency "to hold a landlord who knows of the conditions that later cause injury, and has good reason to suspect their potentiality for harm, for his nondisclosure of the situation though he himself believes it to be safe." At least one jurisdiction has gone even further and has imposed upon the landlord an affirmative duty to use reasonable care to inspect the premises. The Restatement of Torts now states that the lessor is subject to liability if "the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved." Although this does not go so far as to require a reasonable inspection by the landlord, it is satisfied with less than actual knowledge of either the condition or the risk it entails.

In *Smith v. Green*, T, a prospective tenant, went to an apartment house on July 10, 1963, for the purpose of renting one of the two apartments situated therein. The other apartment was occupied by F, the owner's father. F was at all times responsible for renting the half of the house which he did not occupy, collecting rents, paying bills and maintaining the premises. The Supreme Judicial Court treated the situation as one in which both the owner and F were in control of the defective portion of the premises. F told T that "the place was under complete renovation, with repairs also to both rear and front steps." Thereupon, T rented the vacant half of the house, with the term commencing August 1, 1963. T had been a carpenter all of his adult life; F was a house painter. During early August, ladders remained propped against the house all around the rented apartment.

T and plaintiff (T's wife) moved into the apartment on August 10. Their furniture was moved in through the front door because it was larger than the rear door. Plaintiff had used the rear door and steps of the apartment about five or six times prior to August 27, 1963, when

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5 See, e.g., Bowe v. Hunking, 135 Mass. 380 (1883) (where a tread on back stairs, which were enclosed and "not well lighted," had been partly sawed through and painted over, the Court vigorously applied caveat emptor since this defect was discoverable by the tenant). See also Cooper v. Boston Housing Authority, 342 Mass. 38, 172 N.E.2d 117 (1961) (infant burned by contact with uncovered return pipe of convertor; held, plaintiffs not entitled to recover on basis of hidden defect, inasmuch as the location, the exposed surface, the use and purpose of the return pipe were as obvious to the tenant as they were to the landlord).

6 See 2 Harper and James, Torts §27.16 (1956).

7 Ibid. See also Cutter v. Hamlen, 147 Mass. 471, 18 N.E. 397 (1888).

8 See Noel, Landlord's Tort Liability in Tennessee, 30 Tenn. L. Rev. 368 (1963); 2 Harper and James, Torts, Comment to §27.16 n.9 (Supp. 1968).

9 Restatement of Torts Second §358(1)(b).
she was injured in a fall on the rear steps. The first or lowest step was made of concrete, the next step of wood. As she started up the rear steps and stepped on the wood tread, the wood tread gave way and a portion of the front or nosing of the step broke off. When T rented the apartment, the rear steps were "weather-beaten, weatherworn." They looked the same on the day of the accident as they did when plaintiff first saw them. Without objection, evidence was introduced that F visited plaintiff after the accident and told her several times that he was "negligent in not repairing the steps." The Court held that the jury could reasonably have found from F's statements to T before the letting, coupled with his admissions to plaintiff following the accident, that he knew that the steps were defective (but that he negligently failed to repair them), that the defect was not noticeable to T and plaintiff, and that F did not warn T and plaintiff of the defect. Hence, there was no error in denying a directed verdict for the owner and F. Although the issue in the instant case was basically one of fact, it is nevertheless a welcome addition to the increasing number of cases and commentaries across the nation which advocate an amelioration of the tenant's status.  

§4.5. Fraudulent conveyances: Wife as creditor. The Uniform Fraudulent Conveyance Law confers jurisdiction to set aside conveyances made to "hinder, delay or defraud either present or future creditors ..." To benefit from the rights created by this act, a person must qualify as a "creditor." The act defines a creditor as being "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." During the 1970 Survey year, the Supreme Judicial Court was confronted with the issue of whether a wife was a creditor within the meaning of the act.  

In Jorden v. Ball, a husband purchased realty (during coverture), taking title in his own name. Thirteen years later, in 1959, the husband left the wife and moved to Florida. In March, 1967, the wife brought a petition for separate support which resulted, on October 31, 1967, in a decree declaring that she was living apart from her husband for justifiable cause. On June 5, 1967, the husband (in Florida) gave a power of attorney over his realty to a Massachusetts lawyer. On November 17, 1967, the lawyer conveyed the realty to his secretary. There was no actual consideration for this conveyance. On November 29, 1967, the wife brought this suit to set aside the conveyance and have title to the property vested in her. The instant case is an appeal from a decree in this suit setting aside the conveyance and ordering the property conveyed to the plaintiff. Subsequent to the commencement of the suit, on April 29, 1968, the wife was granted a decree nisi of


§4.5. 1 G.L., c. 109A, §7.
2 G.L., c. 109A, §1.
divorce, which included a provision that the realty be conveyed to her. No appeal was taken from this decree.

The Court held that a wife, in the plaintiff-wife’s circumstances in this case, was a "creditor." She had, at the times both of the conveyance and of this suit, a right as a wife to support and maintenance by her husband, which was enforceable by a court at her behest.\(^4\) Cause for divorce, which would have resulted in a possible claim to the husband’s assets pursuant to a divorce decree, also existed at those times. In view of the lengthy estrangement and separation decree, it was not unlikely that the wife might seek a divorce (which she, in fact, did within two weeks after commencing this suit). Although these claims may have been somewhat imperfect and contingent, the wife still qualifies as "creditor" since persons having "unmatured" and "contingent" claims are encompassed by the statutory definition of "creditor."

In reaching this result, the Court distinguished the apparently inconsistent case of Blumenthal v. Blumenthal.\(^5\) In that case, a wife who had been awarded a judgment in New York for damages for a husband’s breach of a separation agreement was held not to be a "creditor." The Court differentiated Blumenthal on the basis that a legally cognizable claim must be established as a prerequisite to the invocation of the remedies afforded by the fraudulent conveyance act: "The remedy is incidental to the claim. If the claim is not established, then the whole proceedings fail . . ."\(^6\) Because of the then existing disability of a wife to enforce a contract against her husband, the wife was held not to have a legally cognizable claim.

It should be noted that this decision is narrowly framed and its future reach is uncertain. The Court specifically limited its decision by concluding: "We decide only that a woman adjudged to be living apart from her husband for justifiable cause, where divorce proceedings, as here, were imminent, qualifies as a 'creditor' under C. 109A."\(^7\) (Emphasis added.)

\(\S 4.6.\) Creation of interests by reference to boundaries and plans. 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, the grantee may be deemed to have acquired an easement with respect to such street or space.\(^1\) The Massachusetts rule on the subject has been stated by Justice Spalding as follows:

\ldots when a grantor conveys land bounded on a street or way, he

\(^4\) G.L., c. 209, \(\S 32.\)
\(^5\) 303 Mass. 275, 21 N.E.2d 244 (1939).
\(^6\) Id. at 278, 21 N.E.2d at 246.

\(\S 4.6.\) 13 Powell, Real Property \(\S 409\) (1951).
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.2

Although 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.”3 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.4 The rule is applicable even though the way is not yet in existence.5

The scope of this rule was limited this year in the case of Uliasz v. Gillette.6 The Supreme Judicial Court held that the “estoppel” inures only to the benefit of grantees (and their successors in interest) of the grantor to be estopped. Other persons who may have acquired title to adjacent land cannot claim an easement by implication against the aforementioned grantees and their grantor merely because their grantor saw fit to describe the premises conveyed as being bound by a street shown on a plan filed by the grantor sought to be “estopped.”

The Court further indicated that, when such an easement does arise, it is appurtenant to the land conveyed by the deed giving rise to the “estoppel.” It is not an easement in gross and can be used only in conjunction with the land so conveyed.

§4.7. Condominiums: Title registration. The relationship between condominiums and title registration has remained somewhat ambiguous. Until this year, G.L., c. 183A, §16, provided: “The owners of any land and buildings who wish to submit such land and building to the provisions of the chapter [condominium law] may petition the land court for removal of such land from the provisions of Chapter one hundred and eighty-five [title registration].” This statute failed to resolve at least three questions: (1) it was unclear whether the organization of a condominium precluded registration of the land under Chapter 185; (2) it was uncertain whether the land court could inquire into the sufficiency of the master deed required to be filed under the condominium statute;1 and (3) it was unknown whether the con-

3 3 Powell, Real Property §409 at 413 (1952).

§4.7. 1 G.L., c. 183A, §8.
dominium units, as distinguished from the land, could be registered under Chapter 185.

This Survey year, the legislature amended Chapter 183A, Section 16. This section now provides:

The owners of any land may submit the same to the provisions of this chapter by the recording in the registry of deeds of a master deed, and, upon such recording and a petition by the owner, the land court shall issue an order removing such land from the provisions of chapter one hundred and eighty-five. The land court shall not inquire into the sufficiency of said master deed nor its compliance with this chapter unless the owner shall seek to register said master deed under the provisions of chapter one hundred and eighty-five.2

Although this statute appears to clarify the first two questions raised herein, it does not resolve the issue of whether the condominium units can be registered under Chapter 185. Putting aside the inferences to be drawn from this particular statute, support for the registration of such interests can be drawn from Chapter 183A, Section 3, which provides that each unit in the condominium “shall constitute real estate” and from Chapter 183A, Section 8, which provides that the “master deed shall be recorded in the registry of deeds or the land registration office where the real estate is located . . . .” The major policy obstacle to the registration of the individual condominium units is that the certainty sought under, and provided by, Chapter 185 cannot be attained with respect to condominium units, since the dimensions of the individual units can be so easily altered.

STUDENT COMMENT

The two cases to be examined, Wilshire Enterprises, Inc. v. Taunton Pearl Works, Inc.1 and Strong v. Stoneham Co-operative Bank,2 deal with the problems of acceleration clauses and the effect of tender both before and after the election to foreclose. In Wilshire the defendant was the holder of an installment note, the terms of which provided for quarterly payments. The note further provided that in the event of default for more than 30 days, the entire unpaid balance would become due and payable at the election of the holder. On May 3, when the plaintiff was over a month late with his first installment payment, he was notified by the defendant of the default and the defendant’s right of acceleration. Immediately upon receipt of the notice, the plaintiff


sent the defendant a check for the amount due. On May 9, the defendant sent the plaintiff a letter accepting the check without waiving default under the note. Later, however, by a letter dated June 11, the defendant notified the plaintiff that he was exercising his option to call the unpaid principal with interest and that he would foreclose the mortgage in the event of failure to comply.

The defendant appealed from a decree enjoining the foreclosure. The Supreme Judicial Court, affirming, HELD: Acceptance by the mortgagee of the amount in default before he elected to enforce the acceleration clause operated as a waiver of that provision.

The Court reasoned that under this type of acceleration clause a default in payment requires a positive act, an operative decision to accelerate by the creditor. Accordingly, payment of the overdue installment, prior to the time the option is exercised, removes the conditions upon which the exercise may be based.

In Strong the plaintiff obtained three loans from the defendant bank, each secured by a mortgage on a separate piece of real estate. Each of the notes contained the provision: “Failure to pay any of the installments within thirty days from the date when they become due shall make the whole of the balance of the principal sum immediately due and payable at the option of the holder.” Prior to the end of March, the plaintiffs were in arrears on the monthly payments on all mortgages and were notified of this by the bank. On or about July 25, with no notice given to the plaintiffs, the bank commenced proceedings to foreclose the mortgages on two pieces of the property, and on or about August 27 the bank commenced foreclosure proceedings on the third piece of property. On September 10, the plaintiff tendered a check for the total installments which were past due. (Not until foreclosure proceedings were started was there a tender of payment of the late installments.) The bank refused the check.

The defendant appealed from a decree restraining the defendant bank from pursuing foreclosure proceedings against the three parcels of land. The Supreme Judicial Court, reversing, HELD: A default in payment requires a positive act, a decision to accelerate by the creditor. The commencement of an action before tender of the amount due was one way the option to accelerate could be exercised.

This comment will examine those areas the Court did discuss and some related problems which it did not. It is hoped that this extended coverage of the subject will increase the value of examining the actual decisions in Wilshire and Strong. A closer examination of the rationale of the two cases and the circumstances which surround them will seek to disclose their precedential value as well as the problems which these two decisions may generate. It should be noted that these are cases of first impression in Massachusetts. Consequently, before investigating acceleration clauses per se, some general observations are in order concerning a note which is secured by a mortgage.

The first area which will be examined is whether the courts treat the
note and the mortgage as one integrated instrument or as two separate instruments. This particular problem would arise in a situation where the note contained some information and the mortgage contained additional information. Together the two instruments would make sense but when considered separately certain important facts would be missing. An example of this situation would be a case in which the mortgage contained an optional acceleration clause which the note did not, and where a foreclosure action, based upon a default in payments on the note, was brought. Should the courts look to the mortgage in order to include the acceleration clause which was contained in the note? It should be noted that the mortgagee is seeking not only a judgment for the amount of the debt, but also a judgment allowing the sale of the specific property encumbered in order to pay the debt.

This was the problem facing the New York Supreme Court in Biedka v. Ashkenas. The mortgage in question provided that the entire principal sum should become due upon the default of any installment payment. The instrument accompanying the mortgage contained no such clause. There was a default in an installment payment, and the plaintiff brought an action for the entire balance which he claimed was due. The defendant, on the other hand, alleged that only the installment payment was due. The court ruled that the entire balance was due, stating that "the two instruments being made at the same time, are to be read and considered together as parts of the same transaction and hence the terms of one may explain and modify the other."4 The California case of Trinity County Bank v. Hass is another example of a mortgage given to secure a note, and an acceleration clause in the mortgage but not in the note. There was a default in the interest payments, and the mortgagee sued to collect the entire principal sum, as allowed by the acceleration clause in the mortgage. The court said:

... The note and mortgage, being parts of one transaction, are to be read together, and the [mortgagee] may therefore rely on the provision contained in the mortgage, making the principal due for non-payment of interest at the payees' option, although the note contains no such provision.6

It appears that this integration theory is generally followed by the courts, and an acceleration clause written into the mortgage becomes part of the note it was given to secure.

Another observation to be made is that if the mortgage agreement to accelerate the maturity of a debt does not work a forfeiture, it will be enforced according to its terms. The general rule is that an acceleration clause works neither a forfeiture nor a penalty but is simply a matter

4 Id. at 648, 197 N.Y. Supp. at 852.
5 151 Cal. 553, 91 P. 385 (1907).
6 Id. at 555-556, 91 P. at 386.
of contract, determining when the debt is payable. The application of this rule can be clearly seen in *Swearingen v. Lahner*, where there was the typical situation of a note secured by a mortgage. The mortgage contained an acceleration clause which the mortgagee could initiate at his option if there was a nonpayment of the interest when due. If the mortgagee decided to accelerate, the entire sum of principal and interest would become due and collectable. The Supreme Court of Iowa noted that stipulations of the type found in these notes and mortgages were not like penalties or forfeitures and for that reason were not looked upon with disfavor by the courts. These stipulations were only considered to be agreements for bringing the notes to an earlier maturity than expressed on their face and, therefore, were to be construed by the same rules as any other contract.

Although the general rule is to not treat acceleration clauses as penalties or forfeitures, there are exceptions. One of these was pointed out by the Supreme Judicial Court in *A-Z Servicenter, Inc. v. Segal*. It was held that the particular acceleration clause in question was actually a penalty. In that case there was supposed to be a $20,000 note secured by a mortgage, but the defendant drafted the note in such a way as to include the entire interest until maturity, thereby increasing the potential liability on the note to $41,400. This sum included the total interest on the note, not just the interest due at the time of the breach. If any payments were in default, the defendant could accelerate and the entire $41,400 would become due and payable, less payments already made. The Court noted that:

... When a note is given for a fixed sum representing principal and interest for the period of the note, the clause accelerating the maturity of the debt will not be enforced as a future interest. The mortgage was security not only for the principal but also for payment of interest. To allow a charge for unearned interest in the attending circumstances would be unconscionable.

Turning now to a more specific discussion of acceleration clauses, it seems advisable to begin by examining their status in Massachusetts. As previously noted, there is not a considerable amount of mortgage litigation in this state. Nevertheless, the status of the acceleration clause seems to be firmly established. In fact, a clear description of how acceleration clauses are to be treated in Massachusetts is found in *A-Z Servicenter, Inc. v. Segal*:

An acceleration clause advancing the maturity of the principal upon a breach of a mortgage note at the option of the holder is a common provision and has been held legal and binding in this

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8 93 Iowa 147, 61 N.W. 431 (1894).
10 Id. at 677, 138 N.E.2d at 269.
Commonwealth. . . . This would also be true as to interest if the acceleration extended no further than to include interest actually due at the time of the breach.\textsuperscript{11}

This rather clearly establishes that in Massachusetts the courts will generally accept acceleration clauses as valid and will enforce them if certain requirements are met. It is these various requirements upon which the remainder of this comment will focus.

The first of these conditions to be considered involves the mortgagor's election to accelerate. Here it is important to note whether the provision to accelerate operates \textit{automatically} to mature the debt upon default, or whether some \textit{positive act} of election by the mortgagee is required before the acceleration clause takes effect. If the acceleration is automatic, the mortgagor will not have an opportunity to cure the default, whereas if the mortgagee has to make a positive election, the mortgagor will have such an opportunity.

In both \textit{Wilshire} and \textit{Strong}, the acceleration clauses were of the option type. In both cases, the Court emphasized that a positive act is required in order to accelerate, and its emphasis should be noted. In short, the Court said that the right to accelerate does not come about automatically upon default, but rather that an election is required. In examining this particular point, the Court made no reference to any Massachusetts law as authority, although it would seem that the earlier case of \textit{Grozier v. Post Publishing Co.}\textsuperscript{12} could have provided a basis for decision. In \textit{Grozier}, the Court found that an election was required even though the acceleration clause was automatic. In so doing, it adopted the majority rule which holds that such an automatic acceleration clause should be considered not as self-operating but as conferring an option which the holder may effectuate by a demand or other affirmative action. It seems that if the Court felt an affirmative election is needed with an automatic acceleration clause, it could logically have applied this requirement to the optional acceleration clauses in both \textit{Strong} and \textit{Wilshire}, rather than refer to cases from other jurisdictions in reaching its decision.

It appears that the principles expressed in \textit{Wilshire} and \textit{Strong} are in line with those of the majority of other jurisdictions. The policy behind this majority rule is twofold. First, if acceleration were automatic upon default, the debtors could default intentionally in order to mature the notes early and save themselves some interest payments. Second, the creditor would not be able to exercise any degree of leniency with a debtor if acceleration took place automatically upon default. One of the many cases supporting the Supreme Judicial Court's

\textsuperscript{11} Id. at 676, 138 N.E.2d at 269. This view establishing the general validity of acceleration clauses in Massachusetts can also be seen in \textit{Cassiani v. Bellino}, 338 Mass. 765, 157 N.E.2d 409 (1959), and \textit{Grozier v. Post Publishing Co.}, 342 Mass. 97, 172 N.E.2d 266 (1961).

\textsuperscript{12} 342 Mass. 97, 172 N.E.2d 266 (1961).
requirement of a positive act of election is *Trinity County Bank v. Hass.* In *Hass,* the Supreme Court of California was faced with an option type of acceleration clause. After the mortgagor had defaulted on his payments, the court stated that the principal sum did not become automatically due on the default. The holder of the note was given a mere option, which he could elect to enforce or to waive. The court noted that making this election required some outward act and not just the holder’s mental determination that he intended to accelerate. Another case supporting the Supreme Judicial Court’s reasoning is *Gunby v. Ingram.* This case is illustrative because the Supreme Court of Washington combined the automatic and optional acceleration clauses into one category and noted that:

...[W]hether there be words of option in the agreement or not, such a provision hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it before tender is actually made, there is in law no default such as will cause the maturity of the debt before the regular time provided in the agreement.

In effect, the court here stated that some affirmative act, such as the bringing of an action, must be taken by the mortgagee in order to announce his election to accelerate. New York courts concur in this requirement of a positive act to show election.

A problem closely related to that of whether an election to accelerate is necessary is whether notice of foreclosure must be given to the mortgagor before starting the action, or if the commencement of the foreclosure action will constitute sufficient notice. In *Wilshire,* the mortgagor in default was notified before the foreclosure action was started that unless he paid the entire principal sum the mortgagee would foreclose. In *Strong,* on the other hand, no notice was given to the mortgagor that foreclosure actions were going to be instituted on the three parcels of real estate. The Supreme Judicial Court in *Strong* realized that no notice had been given, but recognized that “[i]n most jurisdictions the bringing of the foreclosure action is a sufficient election.”

On this issue of whether notice of the foreclosure action is necessary to constitute a valid election, it appears that the Court may have overlooked some Massachusetts authority. However, the approach it adopted nevertheless seems to be the majority opinion. As for the possible Massachusetts authority which might have been used, *Cassiani v. Bellino* would seem to be applicable. There the Court

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13 151 Cal. 553, 91 P. 385 (1907).
14 57 Wash. 97, 106 P. 495 (1910).
15 Id. at 100, 106 P. at 495-496.
was faced with the situation of a demand note which was in default and which contained an optional acceleration clause. The question before the Court was whether the signer of a note containing an optional acceleration clause was, after default, entitled to a special notice before the suit was instituted. The Court rejected the theory that such notice was required, stating that the institution of the suit was a sufficient election. Although this case only concerned a note, with no mortgage securing it, its reasoning might well have been used in Strong, rather than the generalization that in most jurisdictions notice is not required in an election to accelerate.

A few cases from other jurisdictions serve to reinforce the Supreme Judicial Court's finding in Strong, namely, that no notice is required to effect a valid election. The court in a Michigan case, *Hawes v. Detroit Fire & Marine Insurance Co.*, 19 set forth the prevailing view by stating that "notice of election to treat the whole amount of the mortgage debt as due before proceeding to foreclosure is not necessary. The procedure to foreclose sufficiently shows the mortgagee's intention."20 However, there is at least one jurisdiction where the bringing of the foreclosure action is not a sufficient election, and other notice must be given unless the parties specifically waive this notice requirement in their agreement. In *Grootemaat v. Bertrand*, 21 the Wisconsin Supreme Court reasoned that, when a mortgage contains an acceleration clause "and nothing is said in the mortgage about giving notice of such option [to accelerate], the mortgagee must give notice of his election to exercise such option."22 The court also recognized the fact that this is contrary to the rule in most jurisdictions.23 Even under the majority rule, however, there may be situations in which notice of the election to foreclose must be given to the mortgagor. Such a situation arose in a New Jersey case, *S. D. Walker, Inc. v. Brigantine Beach Hotel Corp.*, 24 where the court declared that "[a] demand before bringing foreclosure, for failure to perform a condition or covenant of the mortgage, is necessary only where the mortgage expressly calls for notice."25 This case involved such a requirement of express notice.

The no-notice standard seems to be an equitable approach to the problem, since it should be assumed that the mortgagor who entered into the agreement knew its terms when he signed. Requiring the mortgagee to give notice before starting the action would put an unnecessary burden on him in enforcing a contract which was freely made and which did not include a notice requirement.

20 Id. at 326, 67 N.W. at 330.
21 192 Wis. 519, 213 N.W. 294 (1927).
22 Id. at 521, 213 N.W. at 295.
23 Ibid.
25 Id. at 202, 129 A.2d at 763.
Turning now to the main problem faced by the Court in both Wilshire and Strong (namely, the effect of a payment or tender made either before or after the election to foreclose), again it should be noted that there is no Massachusetts authority on this subject. Consequently, a broad examination of the status of this subject in other jurisdictions and a conclusion as to whether or not the Massachusetts Supreme Judicial Court adopted the most rational approach is in order.

The particular problem facing the Court in Wilshire was whether a payment accepted by the mortgagee, after default but before election to foreclose, would act as a waiver of the mortgagee's right to accelerate. The same problem would occur in a situation where payments in default were tendered by the mortgagor, but refused by the mortgagee, if they were tendered before the mortgagee elected to foreclose. The majority view is clearly stated in Trinity County Bank v. Hass, and the Court in Wilshire relied mainly upon this case in reaching its decision. The court in Hass was faced with a similar default situation on a note containing an optional acceleration clause:

If after a default in the payment of interest the holder accepts the overdue interest . . . before electing to declare the principal sum due . . . the right to exercise the option is lost. And we think it is equally lost if before the option has been in fact exercised the defaulting debtor pays or offers to pay the overdue interest . . . Here the debtor, by his tender, followed by the deposit in bank, extinguished the obligation to pay the interest then due. Such tender and deposit constituted a payment . . . if made before the plaintiffs had exercised their option to declare the principal due.

This approach, as articulated by the Supreme Court of California, is also followed in other jurisdictions. Another example is Cresco Realty Co. v. Clark, where the New York Supreme Court was also faced with the problem of a debtor tendering interest payments, which were in default, to the creditor before the creditor elected to accelerate. The court here concluded that "[n]o election having been made . . . the tender was good and barred the right thereafter to elect that the principal become due for non-payment of interest." The Washington Supreme Court also followed this approach when it stated that:

... a provision in a note or mortgage hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it before a tender is actually made, there is no default such as will cause the maturity of the debt before the regular time provided in the agreement.

26 151 Cal. 553, 91 P. 385 (1907).  
27 Id. at 556-557, 91 P. at 386.  
29 Id. at 146, 112 N.Y. Supp at 551.  
The above cases represent the majority view, but there is also a minority approach to which the Court in Wilshire does not refer. This minority view is that the mortgagee is not obligated to accept payment or tender after default but before election to foreclose but, to the contrary, he is allowed to institute foreclosure proceedings even though an attempt had previously been made to settle the payments in default. Examples of this minority approach can be seen in Swearingen v. Lahner and Connecticut Mutual Life Insurance Co. v. Westerhoff. In Swearingen, payments became due in March, an effort was made to pay in September, and, although the foreclosure action was not commenced until October, the court nevertheless allowed the proceeding to be instituted. The court felt that the mortgagee could not be compelled to accept the interest due, thereby giving up his claim for the entire sum. It reasoned that the right to foreclose had accrued on the default, and that tender of the payments in default would not defeat this action. In Westerhoff, the Supreme Court of Nebraska adopted the same basic approach when it decided that tender of the overdue interest after default did not deprive the mortgagee of his right to foreclose, even though he had not yet made such an election.

The Supreme Judicial Court in Wilshire, however, adopted the majority view on this point; and henceforth, if a mortgagor is in default on his payments, he will be able to prevent the mortgagee from foreclosing by paying or tendering the payments in default before the mortgagee elects to foreclose. This would seem to be a better approach than the minority view, since the period between default and election should give the mortgagor a chance to keep the agreement viable by making payments which are in default. The approach adopted in Wilshire allows this, whereas the minority view does not.

The main issue facing the Court in Strong was the sequence of a default in the payments, an election to foreclose, and then a tender of the payments in default. This differed from Wilshire, where tender was made before the election to foreclose. The Court in Strong concluded that the mortgagee's acceptance of a payment or the mortgagor's tender of payment, after an election to foreclose, does not necessarily destroy the mortgagee's right to accelerate. Since there appears to be no Massachusetts law on this point, a review of the rules of other jurisdictions is in order.

In reaching its decision in Strong, the Court seemed to rely mainly on Gunby v. Ingram, where it was stated that:

... an option in a mortgage note to declare the whole debt due for default in payment of interest could not be exercised after lawful tender of an overdue interest installment, and that some affirmative action must be taken by the creditor to announce the

31 93 Iowa 147, 61 N.W. 431 (1894).
32 58 Neb. 379, 79 N.W. 731 (1899).
33 57 Wash. 97, 106 P. 495 (1910).
election to make due the whole note upon a failure to pay the portion which had become due; and we have decided that the commencement of an action before the tender of the amount due was one way in which such option could be exercised.\textsuperscript{34}

The Supreme Judicial Court interpreted this statement to mean that a tender of payments in default will not waive an election to accelerate, if the election is made before the tender of the payments. This does not seem to be particularly relevant authority, however, since the problem in Strong was that of tender made after an election to foreclose, whereas in Gunby the problem would appear to be that of tender made before election to foreclose.

It appears that Pizer v. Herzig,\textsuperscript{35} which the Strong Court mentioned but did not explicate, would have been a more appropriate example of what the Supreme Judicial Court was seeking to establish. In Herzig, there were payments in default and the mortgagee elected to accelerate, evincing this election by commencing a suit. On the day the suit was commenced, the mortgagor tendered the payments in default but the mortgagee returned them. The court, in allowing the foreclosure, quoted from Rosche v. Kosmowski:\textsuperscript{36}

\[\ldots\] However selfish the plaintiff may have been in refusing to accept this tender, there was no legal obligation upon him to do so. His right to avail himself of the option had then become effective. It was a valuable right and when once operative could not be made nugatory by the effort of the mortgagor to compel him to accept payment.\textsuperscript{37}

These two cases offer more solid reasoning than is evident in Strong, and hence serve to illustrate the basic equity of that decision.

Another relevant problem not dealt with by the Supreme Judicial Court is that of whether an election to accelerate can be revoked, and if it can be, whether this right later can be revived concerning the same default. Once again, no Massachusetts authority seems to cover this exact point. A review of some jurisdictions will at least provide a possible approach by which future cases may be determined.

In Van Vlissingen v. Lenz\textsuperscript{38} the issue was whether, after an election to accelerate, the holder of the note could waive such election and permit the note to continue in force. The Supreme Court of Illinois said that the election could be waived, and that a question of fact for the jury to decide was whether or not the plaintiff, by his actions, had waived his election. This approach of allowing the mortgagee to waive his pre-

\textsuperscript{34} Id. at 99, 106 P. at 495.
\textsuperscript{35} 120 App. Div. 102, 105 N.Y. Supp. 38 (1907).
\textsuperscript{36} 61 App. Div. 23, 70 N.Y. Supp. 216 (1901).
\textsuperscript{38} 171 Ill. 162, 49 N.E. 422 (1898).
vious election to accelerate is acceptable in most cases, but occasionally there will be complications. There are some situations in which the court will feel that the mortgagee's actions did constitute a waiver, even though he did not intend them as such. Conversely, there are situations in which the mortgagee is prevented from waiving his election to accelerate, even when he so desires. An example of the first situation is *Barday v. Steinbaugh*,\(^39\) where the mortgagee elected to accelerate and later accepted payments which were in default. The court felt that this acceptance by the mortgagee constituted a waiver of his election to accelerate, noting that:

> . . . Plaintiff's conduct in receiving delayed payments throughout the entire period could be relied on by the defendants and justify them in believing, and acting, on that belief, that plaintiff's right of acceleration would not be exercised without an opportunity for protection by payments of the amounts due.\(^43\)

The court's decision was based on the theory of reliance, since previously the mortgagee had accepted late payments from the mortgagor. The court felt that the mortgagee's continued acceptance of these late payments, after the election to foreclose, caused the mortgagor to reasonably rely on these actions as constituting a waiver of the election to accelerate. It should be noted that this theory of reliance could be a possible exception to the Supreme Judicial Court's decision in *Strong*. There the Court held that, after an election to foreclose, acceptance of payments in default does not operate as a waiver of the election. The reason that the *Barday* rationale would probably not apply in *Strong*, however, is that the mortgagee in *Strong* had not previously accepted late payments from the mortgagor, as the mortgagee had done in *Barday*, and so no theory of reliance could be claimed by the mortgagor.

An example of the second situation — where a mortgagee will be prevented from waiving his election to accelerate — is *Kilpatrick v. Germania Life Insurance Co.*\(^41\) In this case the mortgagor was in default and the mortgagee elected to accelerate. The mortgagor, when notified of the election to foreclose, contractually obligated himself to some new financial arrangements with another party. The mortgagee then attempted to discontinue his foreclosure action, but the court would not allow it, stating that the election to accelerate became irrevocable after the mortgagor changed his position as a direct result of the election to accelerate. The election in this case was final and not subject to change. The basis for this decision, as in *Barday*, was the theory of reliance.

To summarize the problem of waiving an election to accelerate, the basic rule set out in *Van Vlissingen* can be applied in most cases. Un-

\(^{39}\) 130 Colo. 10, 272 P.2d 657 (1954).
\(^{40}\) Id. at 13, 272 P.2d at 658.
\(^{41}\) 183 N.Y. 163, 75 N.E. 1124 (1905).
der ordinary circumstances, if a mortgagee wants to waive his decision to accelerate, he will encounter no problems. There may, however, be situations like those in *Barday* and *Kilpatrick* which will necessitate exceptions to the general rule.

One further question in the examination of waiving an election to accelerate is whether this right to accelerate can be revived in relation to a default which the mortgagee has previously waived. One answer was apparently given in *Hack v. Goldblatt*, where the plaintiff, who had previously waived his election to accelerate, later attempted to revive the election regarding the same default. The Supreme Court of New York would not allow him to do this, saying that once a mortgagee had waived the default, he could not later retract his waiver.

Another facet of the same problem is whether or not the waiver of a particular default prevents the mortgagee from accelerating in another or subsequent default. In the early Massachusetts case of *Da Silva v. Turner*, it was held, inter alia, that a mortgagor who makes a tender to prevent a foreclosure can not, by this tender, prevent a foreclosure for a subsequent breach. From the mortgagee's standpoint then, if he waives his right to accelerate on a particular default, this should not mean that he waives his right to accelerate for a subsequent default which has not yet accrued. The defaults should be treated as two separate events, one having nothing to do with the other. An interesting Massachusetts case dealing with this problem is *Greene v. Richards*, in which the mortgage agreement had two provisions. The first concerned punctuality of installment payments, and the second required the mortgagor to build some bathrooms. There was also an acceleration clause which could be instituted upon a breach of any condition in the mortgage agreement. There was a default in paying installments and the mortgagee elected to foreclose, but the lower court ruled that by accepting subsequent interest payments he waived this right. On appeal, the Supreme Judicial Court did not concern itself with the mortgagee's waiver of foreclosure relating to the accepted interest payments, but rather noted that the mortgage condition concerning the bathrooms had been breached by the mortgagor, and that this would allow the mortgagee to continue the foreclosure action. This clearly illustrates the point that a mortgagee, waiving his right to foreclose on a particular default, does not waive his right to foreclose for another default.

Although *Wilshire* and *Strong* are cases of first impression in Massachusetts, the Supreme Judicial Court in neither case proffered a detailed rationale of its decision. The result of these two cases would seem to mean, however, that in Massachusetts, if a mortgagor defaults on his payments but pays or tenders these payments before the mort-

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43 166 Mass. 407, 44 N.E. 532 (1896).
44 244 Mass. 495, 139 N.E. 175 (1923).
gagee elects to accelerate, the mortgagee's option to accelerate will be extinguished. The opposite result will be achieved where there is a default in payments, the mortgagee elects to accelerate and then payment is tendered by the mortgagor. In this situation the tender will not operate to cut off the mortgagee's previously elected decision to accelerate. These two cases appear to provide principles which will ensure fair and equitable results in the majority of cases to which they are applied. However, it is submitted that the Court in both cases neglected to concern itself with problems that may arise through strict application of these rules.

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