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Chapter 1: Property and Conveyancing

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PART I
Private Law

CHAPTER 1
Property and Conveyancing
CORNELIUS J. MOYNIHAN

A. REAL PROPERTY

§1.1. Landlord and tenant. The termination of a tenancy at will by reason of a conveyance of the fee by the landlord is frequently followed by the creation of a new tenancy at will between the same tenant and the new landlord. More often than not this new tenancy arises by implied agreement between the parties. Whether such tenancy has been created is a question of fact but the payment of rent in advance and the unqualified acceptance by the landlord are prima facie evidence of a new tenancy and, if nothing more appears, control the issue. Moreover, if a new tenancy has been created by the conduct of the parties it has been said that by implication the terms are the same as those of the former tenancy. The new landlord, it has been held, has no greater rights under the new tenancy than his predecessor had under the old.

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§1.1. 1 Although the conveyance of the reversion is usually in fee, a transfer of a portion of the reversionary interest, as by a lease for years, also terminates the subsisting tenancy at will. Pratt v. Farrar, 10 Allen 519 (Mass. 1865).


4 Strycharski v. Spillane, 320 Mass. 382, 69 N.E.2d 589 (1946) (new landlord denied right of inspection of premises because such right had not been a term of the former tenancy).
In *Stedfast v. Rebon Realty Co.*, the Supreme Judicial Court refused to impose on the new landlord the same duties with respect to the condition of the premises that the law imposed on the former landlord. The plaintiff, a business invitee of a tenant, sued the defendant for injuries sustained when he fell on an allegedly defective common stairway. The plaintiff's invitee had been a tenant at will of a portion of the premises since 1948. When this tenancy began, the property was owned by the Abramsons who were husband and wife. On December 15, 1950, the Abramsons caused the defendant corporation to be organized and on the same date conveyed the premises to it. The Abramsons controlled the corporation, both of them being directors and the husband holding the offices of president and treasurer. The tenant, after the conveyance, paid the same rent in advance and this payment was accepted by the defendant. The plaintiff was injured about five weeks after the conveyance to the defendant. The plaintiff contended that a new tenancy having been created by implied agreement on the same terms as the former tenancy the defendant had a duty to use reasonable care to maintain the common stairway in the 1948 condition. The Court rejected without discussion this rather ingenious argument.

It may be that the Court's unwillingness to read into the new tenancy the same legally imposed obligation with respect to the condition of the premises as that resting on the former landlord was due to the fact that as a practical matter it would be impossible for the new landlord in many instances to ascertain the actual condition of the premises at the commencement of the former tenancy at will. However, this knowledge was available to the corporate landlord in the case under discussion and the decision indicates a reluctance to break in on the well-settled Massachusetts rule that the landlord's duty is confined to that of using reasonable care to keep a common passageway or stairway in the same condition it was in, or appeared to be in, at the commencement of the tenancy.

Even this minimal protection given to a tenant under the Massachusetts rule ceases when the tenancy at will is terminated by a conveyance of the reversion. In the *Stedfast* case the tenant had paid the rent in advance for the month of December. Yet the Court stated that the conveyance on December 15 converted the tenancy at will into one at sufferance and until a new tenancy at will had been created by the payment and acceptance of the January rent "the defendant owed him and his invitees no duty of care." Although this

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6 Fenno v. Roberts, 327 Mass. 305, 98 N.E.2d 611 (1951); McCarthy v. Isenberg Bros., Inc., 321 Mass. 170, 72 N.E.2d 422 (1947). In the majority of states the landlord is under a duty to exercise reasonable care to maintain in safe condition those portions of the premises retained in his control. 2 Restatement of Torts §360. For a collection of cases, see 26 A.L.R.2d 468 (1952).
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statement is supported by prior cases it is in some situations of questionable accuracy to describe such a tenant as a tenant at sufferance. It is of the essence of an estate at sufferance that the tenant occupies wrongfully. But where a tenancy at will of dwelling accommodations has been terminated without fault of the tenant, other than by the statutory notice to quit, the tenant has the right to continue in possession until the expiration of the prescribed period after the notice of termination specified in G.L., c. 186, §13. He holds possession rightfully under a statutory tenancy and his status cannot properly be classified as that of an unlawful occupant. The duty owed to him by the landlord should be analogous to that owed to a tenant at will.

§1.2. Land use control: Zoning. The inevitable pressure against land use controls coming from landowners desiring to make more profitable development of their land is reflected in a noticeable increase in litigation. During the 1956 Survey year more zoning cases came before the Court than in any other branch of the law of property. These cases, ten in all, are sufficiently numerous to indicate a crystallizing of judicial policy in some areas of zoning law.

Three of the cases dealt with the granting of variances. In each case the board of appeals granted a variance, the Superior Court affirmed the board's decision, and the Supreme Judicial Court reversed. In the first of these cases, Blackman v. Board of Appeals of Barnstable, the same locus was involved as that in the leading case of Pendergast v. Board of Appeals of Barnstable, discussed in the 1954 Annual Survey. In 1953 Pendergast had applied for a variance

9 "A tenant at sufferance has no estate or title, but only a naked possession, without right and wrongfully, stands in no privity to the landlord, at common law is not liable for rent, is not entitled to notice to quit, and has no action against his landlord or other person entitled to possession, if himself, his family and goods are ejected without unnecessary force. He differs from a trespasser or disseisor only in that his entry upon the premises is not unlawful. His continued occupancy is due wholly to the laches or forbearance of the person entitled to possession in not evicting him." Benton v. Williams, 202 Mass. 189, 190, 88 N.E. 843, 844 (1909).
10 The statute reads: "Whenever a tenancy at will of premises occupied for dwelling purposes . . . is terminated, without fault of the tenant, either by operation of law or by act of the landlord except as provided in section twelve, no action to recover possession of the premises shall be brought, nor shall the tenant be dispossessed, until after the expiration of a period, equal to the interval between the days on which the rent reserved is payable, from the time when the tenant receives notice in writing of such termination; but such tenant shall be liable to pay rent for such time during the said period as he occupies or detains the premises, at the same rate as theretofore payable by him while a tenant at will." In the Stedfast case the premises were in fact occupied for business purposes but the Court drew no distinction between types of occupancy.


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to permit him to erect a commercial bathhouse in a residential zone of the well-known Craigville Beach area on Cape Cod. The board refused to grant the variance and its decision was affirmed in the Pendergast case. After this decision Pendergast again applied for a variance and this time the board acted favorably. The Superior Court judge, on an appeal by abutting landowners, entered a decree that the board had not exceeded its authority in granting the variance. The substantive grounds for reversal by the Supreme Judicial Court were that the evidence would not support a finding of substantial hardship, owing to conditions especially affecting the locus as required by G.L., c. 40A, §15.

The Court's rigid insistence upon compliance with the statutory prerequisites for the granting of a variance sharply restricts the discretionary power of the board of appeals to the area limited by the statute. The decision in this respect reflects a change in attitude from that shown in the first Pendergast case wherein the Court stated: "The board of appeals is a local board familiar with local conditions. It can deal understandingly with questions of variance." And in commenting on the evidence in that case the Court concluded: "Whether a variance ought to be granted was an administrative question upon which reasonable persons might differ." It is probable that the stiffened attitude shown in the Blackman case was due to apprehension of the erosive effect on zoning of successive step-rate variances. The owner of the locus had already been granted a variance allowing him to operate a commercial parking lot in a residential zone. The board, with considerable evidential support for its view, concluded that the construction of toilet facilities on the premises was advisable for sanitary reasons. It concluded that if such facilities were installed it would be only fair to broaden the permitted variance so as to include a bathhouse. The Court's pithy comment on this rationalization was: "If this philosophy were to prevail in the granting of variances there would soon be an end to effective zoning." It may well be that in the light of the unusual facts affecting the locus the proper approach to the problem of Pendergast's parking lot is through rezoning and not through the device of a variance.

In the second of the variance cases, Hurley v. Kolligian, the granting of the variance was reversed on the ground that the hardship to

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4 In 1952 Pendergast had been granted a variance to use the locus as a commercial parking lot. He thereupon installed a hard top surface on the land. No appeal appears to have been taken by abutting owners. Record, pp. 58-59.

5 The only facts found by the trial judge were that the board of appeals "acted in good faith . . . and that its decision was not arbitrary, inconsistent or unreasonable." 1956 Mass. Adv. Sh. 963, 965, 136 N.E.2d 198, 199. The Court pointed out that the trial judge failed to observe the statutory requirement, that he determine the facts for himself, as elaborated in the Pendergast case and Devine v. Board of Appeals of Lynn, 332 Mass. 319, 125 N.E.2d 131 (1955).


7 331 Mass. at 560, 120 N.E.2d at 919.


the landowners did not relate to the premises for which the variance was sought but arose with respect to an adjacent lot owned by the petitioner for the variance. A majority of the Court was of the opinion that the case of Brackett v. Board of Appeals of Boston was decisive of the question despite the fact that the general zoning statute, G.L., c. 40, §30, now G.L., c. 40A, §15, speaks of "hardship to the appellant" whereas that phrase was absent from the applicable statute in the Brackett case.

In the third case in this series, Atherton v. Board of Appeals of Bourne, the grant of the variance was reversed not on the ground of lack of hardship, but because in the judgment of the Court the variance would offend the statutory requirement, that the relief granted may not result in "nullifying or substantially derogating from the intent or purpose of" the zoning by-law. The Court emphasized that a variance must be denied by the board if any one of the statutory requirements is not satisfied.

In contrast with the Court's strictness in dealing with cases of variances, the rezoning cases indicate a judicial deferment to the local legislative judgment. In two cases amendments to the zoning ordinances were unsuccessfully attacked as spot zoning. In Cohen v. City of Lynn, the amendment reclassified a block of land on Lynn Shore Drive from a general residential district to a restricted apartment house district. The judge of the Land Court ruled that the amendment was spot zoning and could not reasonably have been found by the city council to promote the health, safety, convenience and general welfare of the city. The Court, conceding that the trial judge had marshaled persuasive reasons for disagreeing with the city council, nevertheless reversed on the ground that the amendment had not been shown beyond a reasonable doubt to be in conflict with the zoning statute. The Court pointed out that the city council could give weight to a trend in demand for apartments, and could view the needs of the city as a whole and plan for the future. In Raymond v. Commissioner of Public Works of Lowell, a shifting of the locus from a residential zone to an industrial zone was upheld primarily on the ground that

12 G.L., c. 40A, §15. The statute provides that a board of appeals is authorized to grant a variance “where, owing to conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise.” In construing this statute in the Blackman case the Court said: “It will be noted that under these provisions there are several prerequisites to the granting of a variance. These are stated conjunctively and not disjunctively. A failure to establish any one of them is fatal . . .” 1956 Mass. Adv. Sh. at 966, 136 N.E.2d at 200.
§1.3. Land use control: Subdivision laws. Chapter 282 of the Acts of 1956 changed the definition of "subdivision" in G.L., c. 41, §81L, which in substance is the source and limit of planning board jurisdiction as to new developments. The change deals with the ambiguous word "way," which has been variously understood to mean (a) a strip of ground used for passage, (b) a strip of ground in which persons other than the owner have rights of passage, and (c) a strip of ground represented on a plan as a way for passage. The ambiguity is referred to in Rettig v. Planning Board of Rowley,¹ a case in which the Court imported from the policy statement section of the subdivision control law into the definition a requirement of adequacy of a way and then upheld the board because the old way was inadequate to the needs of the new development.

The amendment revises the law which applies when the owner of a tract on an old way wants to divide it into lots, each of which will be accessible to vehicles from that way without the provision of a new way. Formerly such a division was not a "subdivision" and so was not subject to planning board control. Now it is a subdivision if in the board's opinion the old way lacks sufficient width, suitable grades, or adequate construction for anticipated traffic and municipal services. The amendment does not tackle the problem of the ambiguity of the word "way," and indeed introduces a new construction problem: whether a division of land on a public way or on a way already approved by the planning board is a subdivision if such way is in the board's opinion inadequate to the new situation.

The subdivision control law was amended also by Chapter 307 of the Acts of 1956 prohibiting a planning board from making a change in rules and regulations applicable to a pending matter.

§1.4. Land use control: Urban redevelopment. The impact of governmental control of land ownership and land use is being in-

¹ 333 Mass. at 412, 131 N.E.2d at 190.
16 Ibid.
17 Accord: Cohen v. City of Lynn, 1956 Mass. Adv. Sh. 339, 132 N.E.2d 664. These two cases repudiate the implication of Caputo v. Board of Appeals of Somerville, 331 Mass. 547, 120 N.E.2d 753 (1954), that either a mistake in the original zoning or a change in the character of the neighborhood is necessary to justify a rezoning.


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creasingly felt through urban redevelopment programs. Although these programs are still in their infancy they have become the main reliance of the urban communities in their efforts to save the core of their cities and to check or slow down the flight to the suburbs. Demolition, relocation, and rehabilitation are resorted to in order to reverse the process of abandonment and decay of the worn-out central sections of the cities. Difficult problems face the cities in their fight for existence but it is not likely that there will be substantial danger of judicial intervention. The growing body of case law on the subject indicates an awareness on the part of the courts that concepts formulated in an agrarian society are not adequate to the solution of the problems generated by urbanization.

Direct attacks on the constitutionality of the land assembly and redevelopment statute having failed, owners of land in condemned areas have attempted to block the projects on the ground of failure to comply with the statutory requisites. These attempts have been unsuccessful. In McAuliffe v. Burke Co. v. Boston Housing Authority it was held that failure of the housing authority to take all the land included in the area found by the authority to be substandard and decadent did not invalidate the project. And in Bowker v. City of Worcester the contention that the project was "for the express purpose of creating and establishing a 'new look' commercial district" brought the response from the Court that the improvement of the appearance and attractiveness of the area was a valid public purpose. This broadening of the public purpose doctrine beyond the limits of slum clearance was further illustrated by the explicit statement in an Opinion of the Justices that the redevelopment of a "blighted open area," as defined in G.L., c. 121A, §1, is a legitimate public purpose.

2 1956 Mass. Adv. Sh. 447, 133 N.E.2d 493; see also §11.6 infra.
4 The Court cited in support of its ruling the leading case of Berman v. Parker, 348 U.S. 26, 75 Sup. Ct. 98, 99 L. Ed. 27 (1954) (upholding the District of Columbia Redevelopment Act). The far-reaching language of the Court in that case is significant: "We do not sit to determine whether a particular housing project is or is not desirable. The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33, 75 Sup. Ct. at 102, 99 L. Ed. at 38.
6 A "blighted open area" is defined, in substance, as a predominantly open area which is detrimental to safety, health, morals or welfare because it is unduly costly to develop it soundly through private enterprise by reason of physical conditions, or
§1.5. Statute of Frauds: Equitable servitutes. An attempt to make the "understanding" of the parties operate as a substitute for a properly drafted legal instrument failed under somewhat unusual circumstances in Town of Belmont v. Massachusetts Amusement Corp.¹ In March, 1946, the plaintiff town voted to authorize the selectmen to sell a vacant parcel of land, owned by the town, upon such terms and conditions and for such price as the selectmen might determine. This vote failed to comply with the requirement of G.L., c. 40, §15, that the vote of the town specify the minimum price.² In July, 1946, the individual defendant Garrity³ made a written offer to the selectmen to purchase the land for $20,000, the offer containing a so-called condition that a building satisfactory to the selectmen would be erected on the land within five years from the passing of title. The selectmen on July 22, 1946, voted to convey to Garrity on the condition that a building adapted for mercantile purposes, the plans for which would be submitted to the selectmen for approval, would be erected on the land. If the building was not erected in five years the land was to be reconveyed to the town and the purchase price refunded. A copy of this vote was delivered to Garrity who paid a deposit of $500. Thereafter, a deed was delivered to Garrity. This deed was without covenants and contained no reference to the selectmen's vote or to any condition or provision relative to the erection of a building. On March 6, 1947, Garrity contracted to sell to one Kilpatrick for $55,000. This agreement to sell was made subject to the "condition" relative to the erection of the building repeated in the same terms as the selectmen's vote. Kilpatrick in turn assigned to the corporate defendant all his rights under the Garrity agreement and in November, 1947, Garrity conveyed by quitclaim deed to the corporation. This deed contained no reference to the "condition" or provision relative to the building but the corporation had full knowledge of that provision.

by reason of obsolete or faulty platting or subdivision, or diversity of ownership of plots, or by reason of a substantial change in business or economic conditions, or by reason of any combination of such conditions, and which "substantially impairs the sound growth of the community." The validity of the redevelopment act as applied to blighted open areas was expressly left open in the Papadinis case, 331 Mass. 627, 121 N.E.2d 714 (1954).

² This defect was spotted in the course of the title examination made on behalf of the corporate defendant. To correct the defect a special town meeting was held on October 29, 1947, and the town voted to authorize the selectmen to sell at a price of not less than $20,000. Shortly thereafter the selectmen again voted that the land be conveyed to Garrity and a second quitclaim deed was thereupon executed and delivered to Garrity on November 7, 1947. Neither the second vote of the selectmen nor the second deed to Garrity contained any reference to the erection of a building by the grantee. But the trial judge found that it was intended by the parties that the second deed, like the first one, should be subject to the "condition" set forth in the selectmen's vote of July 22, 1946.
³ The offer was actually made by Garrity and one Winters but the latter died before the conveyance by the town and Garrity alone was named as grantee in the deed from the town.

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The corporation having refused to construct the prescribed build­ing or to reconvey, the town brought suit to compel a reconveyance. The trial judge found that "it was the intention of both the town and the defendant Garrity to accept the deed subject to the condition im­posed by the vote of the selectmen" and held that the town had "an equity" in the land, that the corporation took with notice of this "equity" and, therefore, was bound by it.

In reversing a decree in favor of the plaintiff the Supreme Judicial Court rejected the theory that the transaction between the town and Garrity had created in the town an equitable interest in the land. The Court stated bluntly that the difficulty was in discovering a basis for the "equity" and added: "An equitable interest in the land of another cannot arise out of some vague consideration of abstract justice but must be created as the result of some conveyance, contract, fraud, or other circumstance recognized by law as creating such an interest." 4

The absence of any reference to the "condition" in the deeds, to Garrity was held fatal to the town's contention.

The Statute of Frauds was deemed by the Court to be a defense to the contention that there was a contract between the town and Garrity to sell and buy on the terms set forth in the selectmen's vote. The Court stated:

Garrity signed no contract with the town and no memorandum of any such contract. The joint offer of Winters and Garrity addressed to the selectmen in July, 1946, was only an offer and not a memorandum of a complete contract. It could not be read with the first vote of the selectmen as creating a contract in writ­ing . . . because the terms of the offer and the vote are not the same. 5

The defense of the statute was held to be available to the corporate defendant as grantee of Garrity.

The Court rejected the plaintiff's argument that the so-called condition contained in the selectmen's first vote of July, 1946, created an equitable servitude on the land, on the dual basis of lack of a domi­nant tenement and the Statute of Frauds. Pointing out that the town appeared to own no land to be benefited by the erection of a building on the land conveyed, the Court refused to recognize the validity of an equitable servitude in gross. 6 And since an equitable

5 1956 Mass. Adv. Sh. at 196, 132 N.E.2d at 176. It is generally held that it is not essential to the validity of a memorandum that it shall have been made as a memo­randum of the contract. An offer may be a sufficient memorandum. 1 Restatement of Contracts §209; 2 Williston, Contracts §579 (rev. ed. 1936). But the offer here, although it contained the "condition" that a building be erected within five years from the passing of papers "which building will be satisfactory to the Selectmen of Belmont," said nothing about a reconveyance to the town if the building were not erected. Plaintiff's Ex. 3.
servitude is an interest in land, the creation must be evidenced by a written instrument.

As to the Statute of Frauds point, conceivably the Court could have found that the statute had been satisfied by the delivery to and acceptance by Garrity of the selectmen's vote containing the “condition” that the grantee erect a building. The acceptance of a deed poll, containing restrictions, by the grantee binds him in equity under the theory of equitable servitudes.\(^7\)

§1.6. Easement by prescription: “Open and notorious” use. Another page in the long history of the development of easements by prescription was written in Foot v. Bauman.\(^1\) It is commonly stated that it is essential for the creation of such an easement that the use be “adverse” and that one of the necessary elements of adverse use is that it be “open and notorious.”\(^2\) Does this requirement of openness and notoriety mean that the owner of the servient tenement must have knowledge of the use by the claimant? The earlier authorities answered in the affirmative.\(^3\) But in Foot v. Bauman the Court rejected precedent in favor of a rule that would better effectuate the policy of protecting a long continued usage against a slumbering owner of the servient tenement.

The suit was one between neighboring landowners wherein the plaintiffs sought to enjoin the defendant from causing sewage to flow through a private drain running from a large house on the defendant's land under the plaintiff's land to the town sewer. The drain had been constructed prior to 1901 by the common owner of all three lots. In 1912 one Davis became the owner of the dominant tenement and used the sewer until his death in 1944. The servient tenements (now owned by the plaintiffs) were occupied by one De Gersdorff from 1914 to 1944 but De Gersdorff did not become the owner until 1930 and there was no evidence to show the nature of his occupancy prior to his acquiring ownership. Nor was there evidence showing knowledge on the part of the owner of the servient tenements during the period 1914 to 1950 of the existence of the drain. The master, to whom the case was referred, concluded that no easement had been created by prescription because the use had not been an open one for the statutory period. He ruled: “In order for the use to be open it must be either


\(^2\) 5 Restatement of Property §§457, 458.

\(^3\) Oldfield v. Smith, 304 Mass. 590, 24 N.E.2d 544 (1939); Edson v. Munsell, 10 Allen 557 (Mass. 1865); Sargent v. Ballard, 9 Pick. 251 (Mass. 1830). As the Court pointed out in Foot v. Bauman, note 1 supra, the notion that the use by the claimant must be with the knowledge of the servient owner can be traced as far back as Bracton (c. 1254). In the seventeenth and eighteenth centuries, when the modern law of easements started to develop, passages from Bracton's treatise began to appear in the decisions. See 7 Holdsworth, History of English Law 923 et seq. (1926). In Edson v. Munsell, supra, Bracton is quoted extensively.
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(a) known to the owner of the servient tenement, or (b) so conspicuous that it could be observed by the public in general."

The Court rejected both of these tests of openness and explicitly adopted the view that the use by the claimant meets the requirement of being "open and notorious" if it is "known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his premises." The requirement that the use be open and notorious is intended, said the Court, "only to secure to the owner a fair chance of protecting himself." The Court then concluded that upon all of the master's findings (including the fact that three manhole covers were visible on the surface of the servient tenements and that De Gersdorff's employees had actual knowledge of the use) an inference should be drawn that the use of the drain was "open and notorious."

B. CONVEYANCING

§1.7. Vendor and purchaser: Marketability of title. A tenant in common who buys in an outstanding encumbrance on the common property, such as a mortgage, holds it also for the benefit of his co-tenants if they are willing to contribute their share of the cost of acquisition within a reasonable time. This equitable right of the co-tenants arising from the fiduciary relation between them is an inchoate one. Until they pay, or tender payment of, their proportional shares of the cost they cannot assert rights in the acquired interest, and unreasonable delay or laches will bar assertion of the right against the tenant who acquired the superior title.

If it appears from the registry records in the chain of title to a parcel of land that it had been conveyed to tenants in common and that subsequently one of the tenants acquired the title at a foreclosure sale of a mortgage on the common property, does the record title remain defective for the indefinite future despite later conveyances by the single tenant to presumably innocent purchasers? An affirmative answer was given in Salter v. Quinn. In that case the buyer sued to recover a deposit paid to the seller upon the execution of a purchase and sale agreement on the ground that the seller could not convey "a good marketable and clear record title" as required by the terms of the contract. In 1925 the lands in question had been conveyed to Soule and Wyman as tenants in common. In 1928 they ex-


5 Ibid. The owner could prevent the acquisition of the easement by having served on the claimant the notice prescribed by G.L., c. 187, §3.

4 The foreclosure under the power of sale was defective because a copy of the notice of sale and the affidavit were not recorded until thirty-one days after the sale. See G.L., c. 244, §15. But the entry to take possession was duly recorded and the title acquired by entry after the three year statutory period (G.L., c. 244, §1) passed to Wyman, subject to the rights of his co-tenant, because of the deed to him.


6 Ibid. Apparently no attempt was made by the defendant to introduce evidence to prove that the contingent equitable interest of the co-tenant, Soule, had been extinguished by failure to offer to pay his proportionate share of the purchase price within a reasonable time after he knew, or reasonably should have known, of the acquisition of title by Wyman at the foreclosure sale. Since the purchase and sale agreement between the plaintiff and the defendant called for a clear record title such evidence would probably have been inadmissible.

after long-term leases. Generally such interests were created long ago, are insubstantial, and are forgotten by their owners and everyone else while the possessors of the land subject to such interest regard themselves as full-fledged owners. The practical effect of such interests — still speaking generally — is to cloud land titles without actual benefit to the holders of the interests. The new laws will bar suits to enforce such interests unless their owners take action before 1966 to show that they intend to claim them.

From the title examiner's standpoint the statutes have no effect until 1966. Until then every title will still be subject to the risk that, before the period covered by the title search, such a future interest was created and remains effective though no reference to it is disclosed by the title search. It is common for conveyances to make no mention of a condition imposed or a possibility of reverter created by a former owner. Estates under leases for one hundred years or more are customarily conveyed by ordinary deeds as if the lessee had the fee, and such deeds often fail to reveal that the grantor has less than the fee. Beginning in 1966 the risk of such hidden interests will be greatly reduced. The risk will not be eliminated because the holder of the adverse interest may preserve his enforcement rights by recording a warning document naming the assessed owner. If the assessors tax the wrong person or an occupant, that document will not be found in a title examination. Chapter 397 of the Acts of 1956 directs assessors to include the record owner's name in an assessment to the occupant but there are no teeth in the statute. Furthermore, the new lease statute does not apply to leases under which any rent has been paid or tendered since 1936 and the title records afford no evidence on that score.

However, under the new statutes a title examiner cannot safely ignore any such interests which he finds. Such interests created by instruments given before the cut-off date (1955 as to conditions and right of entry and 1956 as to leases) cannot after 1965 be enforced by court action. But these new statutes do not, like the twenty-year statute of limitations, bar enforcement by entry as well.

The owners of such future interests are an assorted group. Deeds on condition as to the kind, height, or locations of buildings on the land are fairly common as are deeds on condition against taverns, factories, or other named uses. Deeds conditioned on support of the grantor have been fairly common in the past but, as that condition must be performed or broken in the lifetime of the grantor, it causes less trouble to title examiners than conditions not so limited. Conditions created since July 16, 1887, like restrictions, if unlimited as to time, expire in thirty years unless expressed in gifts for public, charitable, or religious purposes or in deeds from the Commonwealth. G.L., c. 184, §3. As to possibilities of

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2 Acts of 1956, c. 305 added to G.L., c. 184, §19 the language affecting the reversion after a lease for one hundred years or more.

3 See G.L., c. 186, §1.

4 G.L., c. 59, §11.

5 Conditions created since July 16, 1887, like restrictions, if unlimited as to time, expire in thirty years unless expressed in gifts for public, charitable, or religious purposes or in deeds from the Commonwealth. G.L., c. 184, §3. As to possibilities of
sibilities of reverter affect much railroad land because land was often conveyed to railroads to hold so long as it should be used for railroad purposes. There are also many deeds to churches so long as the land is used for a particular faith. If the new legislation applies to easements on condition, it affects grants like the sidetrack easement in Everett Factories & Terminal Corp. v. Oldtyme Distillers Corp., effective so long as the grantee pays half of the maintenance expense annually. The reversioners after long-term leases who must look to their rights include many churches which more than a hundred years ago followed a passing vogue of giving such leases, some of which are still in force.

It is safe to conclude that many owners of future interests affected by these statutes will not take the required action to preserve their rights. Many will not know they have such interests. Others will not think them worth preserving. Some will lose their rights from ignorance of the new statutes.

Mortgages, which constitute the commonest variety of deeds on condition, are not expressly excluded from the operation of the new act. Amendatory legislation is advisable to make it clear that mortgages are not included within the scope of the act.

§1.9. Defects in recorded instruments. Chapter 348 of the Acts of 1956 undertakes to cure certain defects in recorded instruments unless suit on account of the defect is begun within ten years. For instruments recorded before 1948 the period ends January 1, 1958. Notice of such suits must be recorded within the ten-year period. The statute makes the defective instrument "effective for all purposes to the same extent as though the instrument and the record thereof had originally not been subject to the defect . . .".

The statute enumerates the kinds of defect to which it applies, and it is a mixed bag. It covers defects as to seals and acknowledgments and here it accomplishes its purpose. An instrument defective as to seals is ineffective as to everyone and the new statute cures it by letting the deed have effect. An instrument defective as to acknowledgment is ineffective as to certain persons and the new statute cures it by letting the deed have effect even as against those persons.

The statute applies also to defects as to witnesses, attestation, or proof of execution, apparently to take account of the statutory substitute for acknowledgment under G.L., c. 183, §§34-37, which is rarely used. (There is no reference in the new statute to certificates of oaths.) The statute seems to cover defective or omitted attestation by corporate officers where required by vote or by-laws.

As to defective or omitted certificates of authority for corporate instruments, the statute applies if the corporation is extinct and if the

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§1.9. 1 Chapter 348 adds to G.L., c. 184, a new §24.
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signer was president, treasurer, or another principal officer according to a certificate of condition or other public record filed on behalf of the corporation.

All the defects mentioned so far have the effect of invalidating an instrument (as to some persons or in some circumstances at least) because of its failure to comply with some requirement of law. The statute applies only to defects which offend a requirement of law.

The statute applies also to defects as to the time of execution, recitals of consideration, residence, address, or date, but as to such defects the effect of the statute is obscure. Such a defect is rarely a violation of a requirement of law. Generally it is a departure from normal practice which, for that reason or because of its inconsistency with other recorded evidence, prevents a title examiner from drawing the normal inference as to the regularity of the off-record facts essential to title. For example, if a deed of Blackacre to John Brown of Cambridge is followed six months later in the records by a deed of Blackacre from John Brown of Chelsea, the validity of the second deed depends on whether it was signed by the same John Brown. Lacking the different recital as to residence, the title examiner would infer that it was the same John Brown, but on these facts surely no such inference is warranted. Neither deed violates any requirement of law and the statute would not apply. If a true recital of residence were required by law in every deed, the title examiner would not know whether either deed violated that requirement. The violation of a requirement of law is not the problem in these cases. The problem is whether the off-record facts are favorable to the title despite the adverse indications in the records. In the John Brown case, the question is whether the difference in residence recitals indicates that (a) the grantee in the first deed is not the same as the grantor in the second deed or that (b) he is the same, but he moved, or an error was made in the residence recital in one of the deeds. It is difficult to see how any statute will dispose of such problems outside of the land registration system.

§1.10. Index of federal tax liens. Chapter 644 of the Acts of 1956 requires registers of deeds to keep an index of federal tax liens. The grantor indexes are not well adapted to checking for such liens because the liens may affect real estate acquired later. As the number of recorded notices of such liens is rather small, it is practical to keep a separate index of them. Some registers to do so voluntarily. Formerly a lawyer who, relying on the unofficial index, missed a lien notice which was listed in the grantor index might have been liable to his client for negligence. This act ends that problem.