Chapter 11: Property and Conveyancing

Cornelius J. Moynihan
PART II

Private Law

CHAPTER 11

Property and Conveyancing

CORNELIUS J. MOYNIHAN

A. Real Property

§11.1. Landlord and tenant. The exercise of an option to renew a lease appears to be a relatively simple matter to the ordinary businessman but, as lawyers well know, a carelessly drafted notice of renewal can be the prelude to costly litigation. The case of Ames v. B. C. Ames Co. affords a good example. On April 1, 1946 the defendant leased certain business premises to the plaintiff for a term of ten years with the option to renew for a further term of ten years provided that written notice was given to the lessor at least six months prior to the expiration of the term, the renewal rental to be agreed upon by the parties or determined by arbitration but in no event to be less than $4800 a year. The lease contained the standard clause prohibiting assignment or subletting by the lessee without the written consent of the lessor, but concurrently with the execution of the lease the lessor agreed in writing to assent to an assignment to a corporation “owned and operated by” the lessee. In August, 1946 the lessee organized a corporation and immediately assigned to it by bill of sale all of his right, title and interest in the “business” carried on by him on the leased premises. Thereafter, the corporation “occupied” the premises.

CORNELIUS J. MOYNIHAN is Professor of Law at Boston College Law School. He is the author of A Preliminary Survey of the Law of Real Property (1940) and a contributing author of American Law of Property (Part 7, Community Property) (1952).

The author wishes to acknowledge the assistance of Hugh J. Mulligan, Jr., and Richard C. Driscoll, Jr., members of the Board of Student Editors, in the preparation of this chapter.

conducted thereon a precision machinery business, and until November, 1955 paid to the lessor the monthly rent specified in the lease. No formal assent to an assignment of the lease to the corporation was ever requested.

In September, 1955, a renewal notice was sent to the defendant-lesser on the stationery of the corporation and was signed “Ames Precision Machine Works, Ira R. Ames, President.” This notice recited: “I hereby give you written notice of my intention to renew said lease...” A few days thereafter a renewal lease in duplicate running to the plaintiff individually was executed by the plaintiff and sent to the defendant. The new lease contained a clause calling for a further renewal for an additional ten-year term. On November 28, 1955, the defendant replied and declined to “accept your offer of renewal of lease.”

During the trial of the plaintiff’s bill for specific performance, the defendant-lesser made an entry on the premises, while the original lease was still in effect, to terminate that lease for breach of the condition against subletting. The trial judge found that there had been no assignment or subletting to the corporation, that the occupancy of the premises by the corporation was not a subletting, that the plaintiff-lessee “retained control of the premises at all times,” and that the plaintiff had given proper notice of his intention to renew.

The Supreme Judicial Court affirmed the decree in favor of the plaintiff. Whether the bill of sale given by the plaintiff to the corporation of all his interest “in the business” included therein the plaintiff’s leasehold was a question of fact, the Court ruled, and parol evidence was admissible to explain the meaning of the phrase. A subsequent amendment to the lease executed by the parties and referring to the plaintiff’s obligations under the lease was deemed persuasive evidence that the plaintiff still remained the lessee.

On the more difficult question of whether the occupancy by the corporation amounted to the creation of a subtenancy in violation of the terms of the lease, the Court ruled that: “The mere permissive use and occupancy by this plaintiff’s one man corporation did not as matter of law constitute an assignment or a sublease.” The trial judge’s finding that the plaintiff had “retained control of the premises at all times” was based on extremely thin support in the evidence but the Court’s reluctance to revise this finding of fact, despite a report of all the evidence, may have been because the plaintiff was not entitled to prevail even if there had been a subletting. It would seem fairly clear on the evidence that the corporation acquired possession of the demised premises and that its occupancy was as tenant at will rather than as licensee. But the defendant-lesser had knowledge of the corporation’s

---

2 Record, p. 17.
4 The Court itself at one point in the opinion states that the corporation “took possession of the demised premises.” 335 Mass. at 514, 140 N.E.2d at 656. If the corporation acquired possession its status was that of tenant, not licensee. Lennox v. Haskell, 253 Mass. 334, 148 N.E. 811 (1925); Roberts v. Lynn Ice Co., 187
§11.2 PROPERTY AND CONVEYANCING

occupancy and for several years accepted rent from the corporation. It had by its conduct, therefore, waived the right to enforce a forfeiture for breach of the covenant against subletting, at least in the absence of notification to the lessee of its objection to the continuance of the subletting.\(^5\)

The contention of the defendant that the inclusion in the renewal lease of a further option to renew operated as a counter offer amounting to a rejection of the original option was answered by the Court on the basis of the trial judge's finding that no counter offer was intended by the plaintiff. The subjective intention of the offeror would seem to be immaterial but the plaintiff's original letter to the defendant giving notice of his intention to renew "upon the same terms and conditions" as the original lease amounted to an unequivocal acceptance of the option to renew.\(^6\)

§11.2. Land use control: Zoning. The number of cases relating to various aspects of zoning coming before the Court continued at a high level during the 1957 Survey year. Eleven cases came up on appeal. The variance cases,\(^1\) five in all, manifest the Court's continued insistence that boards in granting variances comply strictly with the statutory requirements.\(^2\) Significantly, the only case in which the action of the trial judge was upheld was one in which the grant of a variance by the board of appeals was annulled.\(^3\) The free and easy attitude of some boards of appeal in considering an application for a variance is illustrated by Spaulding v. Board of Appeals of Leicester.\(^4\) There, one Minasian obtained an option to buy a tract of farmland located in a residential district with the intention of constructing thereon a drive-in theatre, a use not permitted in that area by the zoning by-law. He made application to the board of appeals for a "license to maintain an open air theatre." The board treated this application as a petition for a variance and after a public hearing


6 "But if there has once been unequivocal acceptance, the contract is complete and its binding force cannot be affected by subsequent communications unless they amount to a mutual agreement to rescind." 1 Williston, Contracts §72 (rev. ed. 1936).


2 G.L., c. 40A, §15.


thereon unanimously voted to grant the "petition of Stephen G. Minasian to construct and operate an open air theatre on Main St. Leicester on property owned by him." The paper setting forth this vote was filed with the town clerk on January 7, 1954. It contained no statement of reasons for the board's decision as required by G.L., c. 40, §30 (now G.L., c. 40A, §18). On August 17, 1954, the board filed with the town clerk a "Decision" which, after referring to the hearing and reciting that the locus was not suitable for farming or housing and that relief could be granted without substantial detriment to the public good, stated that it was unanimously voted to grant the variance. The plaintiffs, owners of land near to or adjacent to the proposed theatre site, appealed to the Superior Court within 15 days after this August 17 decision.

The trial judge ruled that the appeal, not having been filed within 15 days from the time of recording of the January 7 paper with the town clerk, had not been seasonably taken and, without reaching the merits, entered a decree dismissing the bill. The Supreme Judicial Court reversed this ruling on the ground that the January 7 paper was not a decision granting a variance within the statutory meaning and that the appeal from the August 17 decision had been seasonably filed. Instead of remanding the case for a hearing on the merits the Court examined the decision of August 17 and because of the lack of a finding by the board of substantial hardship to the applicant ordered the decision of the board annulled. It would seem from the Court's method of disposing of the case that it was of the opinion that no finding by the trial judge of the facts necessary for the grant of a variance could be a substitute for the board's failure to make the findings required by the statute.

In two of the variance cases the Court dealt with the difficult problem of the standing of the plaintiff to maintain an appeal from the board's decision granting a variance. The Zoning Enabling Act grants the right of appeal to "any person aggrieved by a decision of a board of appeals," 5 but owners of land in the area of but not adjacent to the locus stand on precarious ground in attempting to meet this jurisdictional requirement. Such protesting property owners were given a judicial assist over the jurisdictional hurdle in Marotta v. Board of Appeals of Revere. 6 In that case the Court for the first time formulated a rule that there is a rebuttable presumption that property owners to whom the board has given notice of the hearing of the petition for a variance 7 are aggrieved persons within the statutory meaning. The effect of this presumption will be to throw on the defendants the burden of introducing evidence on this issue.

5 G.L., c. 40A, §21.
7 The statute (G.L., c. 40A, §17) requires the board to "send notice [of the hearing] by mail, postage prepaid, to the petitioner and to the owners of all property deemed by the board to be affected thereby, as they appear on the most recent local tax list..."
§11.2  PROPERTY AND CONVEYANCING  69

In Reynolds v. Board of Appeal of Springfield, an owner of land adjacent to the locus but situated in a different and less restricted zoning district was held to be a person aggrieved by the grant of a variance to conduct a nursing home. The decision dispels the uncertainty arising from the opinion in the leading case of Circle Lounge & Grille, Inc. v. Board of Appeal of Boston as to whether a property owner in a different zone could in any event have standing to attack the grant of a variance for land in a more restricted zone.

The close scrutiny of local board action in granting variances which has been evidenced in recent decisions of the Court was applied to the grant of a special permit for a funeral home in Lawrence v. Board of Appeals of Lynn. Although conceding that the grant of a special permit as an exception under G.L., c. 40A, §4 is not governed by the strict statutory standards applicable to variances, nevertheless the Court insisted upon observance of the requirements laid down in the applicable ordinance and reversed, as not supported by the evidence, the finding of the trial judge that the status of the neighborhood would be improved by conversion of the property into a funeral home.

In a decision of far-reaching importance in its effect on zoning by towns the Court imposed severe limitations on the statutory power conferred on the Attorney General to disapprove by-laws. General Laws, c. 40, §32 provides that before a by-law takes effect "it shall be approved by the attorney general or ninety days shall have elapsed without action by" him after the submission to him of the proposed by-law "with a request for his approval." Despite the broad sweep of the statutory language giving an apparently unfettered discretionary power of approval or disapproval the Court in Town of Concord v. Attorney General held that the Attorney General's exercise of this power is subject to judicial review and can be based only upon a legal and not a policy ground. The case came up as a zoning problem. The voters had unanimously voted to amend the zoning by-law of the town of Concord so as to combine two abutting business zones into one business district and to include therein a small swampy area al-

---

9 324 Mass. 427, 86 N.E.2d 920 (1949). In that case the Court laid down the rule that "a proprietor in a less restricted zone is not a 'person aggrieved' within the meaning of the statute by the introduction into a more restricted zone of any use permitted in the zone in which the proprietor's property is located.... The mere circumstance that the properties are near the border line should make no difference." 324 Mass. at 432, 86 N.E.2d at 923.
11 The ordinance provided: "When in its judgment the public convenience and welfare will be substantially served, and where such exception will tend to improve the status of the neighborhood, the Board of Appeals may on petition in specific cases determine and vary the application of the district regulation[s] herein established in harmony with their general purpose and intent as follows: (b) Grant permits for use of any building or dwelling in [any residence district] for funeral homes and services incident thereto." 1957 Mass. Adv. Sh. at 709, 142 N.E.2d at 380.
ready used in part for business under non-conforming uses but classi­
ified as residential property. On submission of the amended by-law to
the Attorney General, he disapproved it "for the reason that it un­
reasonably includes in the area described therein property which is
essentially residential property to the serious injury of the owners
thereof." The only owners of the changed area, far from feeling
that they had been seriously injured by the redistricting of their land,
brought mandamus and certiorari to quash and expunge the Attorney
General's notice of disapproval. In granting mandamus the Court
ruled that the only valid reasons for disapproval are legal grounds such
as a violation of substantive law or a failure to observe procedural
requirements. Viewed in a broader aspect the case illustrates the point
that, despite the old adage, hard cases also make good law.

§11.3. **Zoning Legislation.** Protection against sudden changes in
zoning ordinances and by-laws has been given to developers of residen­
tial property by virtue of a 1957 statute\(^1\) adding a new section to the
Zoning Enabling Act. The new statute gives to a developer who has
obtained approval of a definitive subdivision plan for residences a
three-year period of immunity against amendments to the municipal
zoning laws. The legislation, sponsored by the Home Builders' Asso­
ociation of Greater Boston, will tend to prevent the conflicts between
builders and towns which have been of frequent occurrence during the
recent building boom and are typified by *Simon v. Town of Needham*.\(^2\)
In that case the developer's project was stopped by a quick amendment
to the zoning by-law increasing the minimum lot requirement to an
acre. At the same time the statute should encourage the development
by cities and towns of a long-range master plan instead of resort to
ad hoc zoning.

§11.4. **Eminent domain.** The flood of land damage cases that has
helped to clog the Superior Court docket in recent years is now seeping
into the higher level of the Supreme Judicial Court. Eight eminent
domain cases came up for review during the 1957 Survey year. Several
of these cases are of value to the practitioner engaged in the trial of
this type of suit. *Newton Girl Scout Council, Inc. v. Massachusetts
Turnpike Authority*\(^1\) contains an excellent discussion of the relevant

---


§11.3. 1 Act of 1957, c. 297, adding §7A to G.L., c. 40A.


§11.4. 1 §35 Mass. 189, 138 N.E.2d 769 (1956). The property, part of which
was used as a residence camp for girls. The trial judge excluded sub­
stantial testimony offered by the petitioner to show the extent and character of the
damage to this particular use of the property caused by the partial taking. In
reversing, the Court held that much greater flexibility in the presentation of
evidence should be allowed with respect to this kind of property than in the partial
case of properties having more conventional uses. The jury had awarded damages of
$9,500; at the new trial the jury awarded the petitioner $39,500. For another case
N.E.2d 203 (evidence of necessity of and cost of constructing retaining wall on
remaining land admissible.)
factors of value where the property taken or damaged by a partial taking is primarily adapted for a specialized use. And in 
Muzi v. Commonwealth 2 the Court enunciates a more liberal rule as to qualifications of expert witnesses in the appraisal of business and industrial land located on main highways.3

A radical innovation in the handling of eminent domain claims has been proposed by the Special Commission set up by the 1956 session of the General Court to study eminent domain procedures.4 The Commission proposes that there be created a seven-member commission, comparable to the Appellate Tax Board, in which would be vested exclusive original jurisdiction of all eminent domain cases. After decision by the commission the landowner would have a right to a jury trial.5 Drafts of legislation to carry the Special Commission's proposals into effect were submitted to the General Court and referred by that body to the Judicial Council for study and report.

B. CONVEYANCING

§11.5. Vendor and purchaser: Buyer's election to accept title. A clause which is frequently found in standard forms of purchase and sale agreements but has rarely been the subject of litigation became the focal point of controversy in Gardiner v. Richards.1 This clause gives the buyer the election to accept such title as the seller can convey and to pay therefor the purchase price without deduction if the seller is unable to give title or make conveyance as stipulated.2 Where the defect in title consists of a deficiency in area of the premises the buyer may deem it advantageous to take advantage of this election provision, and in Gardiner v. Richards specific performance was granted the buyers on the basis of such a clause. The purchase agreement in that case called for the passing of papers on February 13, 1948, but the time for performance was successively extended to December 1, 1949. The contract and each written extension stipulated that time was of the essence. A portion of the premises contracted to be sold was not

5 §11.5. 1 §35 Mass. 455, 142 N.E.2d 889 (1957).

Such a clause is contained in the form of "Purchase and Sale Agreement" (Jan. 1950) issued by the Boston Real Estate Board. An earlier edition of this form containing the same clause was used by the parties in the Gardiner case.
owned by the defendant and she was not able to make conveyance as agreed. On December 1, 1949, the plaintiffs made tender and demanded a deed of the premises described in the agreement. It was refused. In February, 1950, the plaintiffs brought an action at law for damages for breach of contract and, while that action was still pending, commenced a suit for declaratory decree in July, 1952.

In holding that the plaintiffs were entitled to a decree ordering the defendant to convey, upon payment of the contract purchase price, that portion of the premises owned by the defendant the Court purported to grant specific performance of the election clause. The plaintiffs' delay of more than two and one-half years in exercising the election is not adverted to in the opinion nor does the Court discuss the effect, if any, to be given to the provision in the contract making time of the essence. The decision would seem to render advisable from the seller's standpoint the insertion in a purchase and sale agreement, which contains such an election clause, of an express time limit during which the buyer can exercise the election.

§11.6. Legislative developments. Additional legislation designed to increase the marketability of titles was enacted in 1957. Protection against obsolete mortgages not readily discoverable within the limits of normal title search is given by Chapter 370 of Acts of 1957. In substance, the statute makes unenforceable mortgages recorded for more than fifty years unless an extension of the mortgage or an acknowledgment or affidavit that the mortgage is not satisfied is recorded within the last ten years of the period.

Clarifying amendments to the inheritance tax lien statute are contained in Chapter 502 of Acts of 1957. The act rewrites G.L., c. 65, §9 and eliminates much of the confusion that arose under the 1954 amendment.

Real estate brokers and salesmen will be required to be licensed after July 1, 1959, under the provisions of Chapter 726 of Acts of 1957.

The revised form of "Purchase and Sale Agreement" issued by the Boston Real Estate Board in November, 1957, provides that the buyer shall have the election "either at the original or any extended time for performance" to accept such title as the seller can give, without deduction from the purchase price. It is doubtful whether the additional words quoted meet the problem raised by the Gardiner case.


The act adds to G.L., c. 260 three new sections: §§33, 34 and 35.

The fifty-year period from recording applies to mortgages recorded on or after January 1, 1915; as to mortgages recorded prior to January 1, 1913, the period of limitation is from date of recording to January 1, 1965. Therefore, the full benefit of the statute will not be obtained until the latter date.


The act adds four new sections (§§54-57) to G.L., c. 13 and fifteen sections (§§87PP-87DDD) to G.L., c. 112.
The act establishes a board of registration of real estate brokers and salesmen and sets forth elaborate provisions for examination, qualification and licensing of applicants. A license as broker or salesman may be granted by the board without examination to applicants "engaged in the real estate business in the Commonwealth" prior to July 1, 1959. Thereafter, applicants must pass a written examination to be conducted by the board at least four times a year. Attorneys are exempted from this examination requirement; nor is a license required of an attorney with respect to services rendered to a client in the performance of his duties as attorney. Inasmuch as purchase and sale agreements are frequently executed by the parties on forms drawn up by brokers without representation of the parties by counsel the new statute may well have a beneficent effect. Cases such as Vallis v. Rimer,\(^6\) where the ignorance of the broker caused the buyers to lose their $1500 deposit, may become less frequent.

Legislation to limit dower and curtesy to lands owned by the decedent at the time of his or her death again failed of passage despite approval by the Judicial Council\(^7\) and the conveyancing bar. The bill will be reintroduced at the 1958 legislative session.

\(^6\) 335 Mass. 528, 140 N.E.2d 638 (1957). The plaintiff buyers proposed to finance the purchase of a house through a GI mortgage and informed the seller's broker that they could not buy without the aid of such a mortgage. The buyers paid a $1500 deposit and although the purchase and sale agreement contained no provision for return of the deposit if the appraisal by the Veterans Administration should be below the sale price, the broker, who was inexperienced in the real estate business, orally informed the buyers that they would get the deposit back in the event of VA disapproval. The broker failed to inform the seller of this promise of a refund. In a suit by the buyers to obtain reformation of the purchase and sale agreement they were denied relief.

The revised form of "Purchase and Sale Agreement" issued by the Boston Real Estate Board (November, 1957) contains a provision for refund in such cases.