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# Chapter 1: Real and Personal Property

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PART I

# Private Law

*CHAPTER 1*

## Real and Personal Property

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In the annual business of the full bench of the Supreme Judicial Court, cases involving one or more aspects of the law of property constitute a substantial portion of the litigation. Almost one fourth of the approximately two hundred decisions rendered with opinions during the survey year fall within the property field. They range in scope from adverse possession to zoning, and although some are of no special significance, many reflect important developments, particularly with respect to landlord and tenant, vendor and purchaser, and zoning.

Legislation affecting the law of property, enacted during the survey year or becoming operative during that period, will probably have a greater impact on both legal theory and practice than the decisional law. The new statute on the Rule Against Perpetuities and the Subdivision Control Law, for example, will have a long-range effect difficult to appraise.

The scope of this chapter is limited to those topics traditionally included under the general heading of real and personal property. Special treatment is given in subsequent chapters to the subjects of conveyancing, future interests, trusts, and mortgages.

### A. Real Property

**§1.1. Vendor and purchaser.** The perennial problem of the Statute of Frauds came before the Court in two cases. In *Cluff v. Picardi* [1] a

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§1.1. [1] 1954 Mass. Adv. Sh. 349, 118 N.E.2d 753.

divided Court sustained a demurrer to a bill for specific performance of an agreement to sell a parcel of land brought against two defendants only one of whom had signed the memorandum. The bill did not allege that the defendant who signed the agreement was acting as agent for her codefendant as well as in her own behalf. The Court held that the fact of agency could not be assumed in favor of the pleader and, further, that the necessary allegation was not supplied by the statement in the bill that the paper annexed thereto and marked "A" was a memorandum of the agreement.

The opinion contains a valuable suggestion on pleading. The Court pointed out that the plaintiff could have set up the agreement in general terms without stating whether it was oral or written, thereby leaving it to the defendants to plead the Statute of Frauds as a defense. This course, had it been adopted, would have taken the plaintiff beyond the demurrer stage.

In *Freedman v. Walsh* [2] the often litigated question of the sufficiency of the memorandum of an oral purchase agreement was raised. The memorandum was held to comply with the statute despite the fact that the land was identified only by lot numbers without stating the town in which the lots were located.[3]

An interesting application of the rule that the seller must tender to the buyer a marketable title to the land contracted to be sold is contained in *Guleserian v. Pilgrim Trust Co.*[4] The buyer brought an action to recover the amount of his deposit on a contract to purchase real estate on the ground that the seller could not convey good title. The alleged defect in the title consisted of grants of an easement of right of way made by the seller as mortgagee. The Court refused to determine the validity of the purported easements because the grantees of the easements were not before the Court, and held that the purported grants amounted to a cloud on the title because the buyer might be exposed to litigation by the owners of the alleged easements. The Court properly refused to enter into a guessing contest as to whether the purported grantees of the rights of way would institute litigation in the future. In the past the Court has not always been so careful in refraining from adjudicating the validity of an alleged encumbrance even though all interested persons were not parties to the litigation. In *Hill v. Levine*,[5] for example, the Court removed the alleged cloud on the title by determining that an equitable restriction imposed on the land had expired and that the restriction was not intended for the benefit of other lot owners who were not before the Court and would not, therefore, be bound by the decree.

**§1.2. Construction of deeds.** A recital of the purpose of the conveyance is frequently found in older grants to cities, towns, and charita-

[2] 1954 Mass. Adv. Sh. 451, 119 N.E.2d 419.

[3] For an excellent brief discussion of the requirements for a sufficient memorandum see Epdee Corp. v. Richmond, 321 Mass. 673, 75 N.E.2d 238 (1947).

[4] 1954 Mass. Adv. Sh. 489, 120 N.E.2d 193.

[5] 252 Mass. 513, 147 N.E. 837 (1925).

ble organizations. Such a litigation-breeding clause posed a problem of construction for the Court in *Loomis v. City of Boston.*[1] In 1883 land was conveyed to the city in fee, according to the habendum clause, "for the purposes of a public park." Thereafter the land was used by the city as a public park for more than fifty years. In 1951 the legislature authorized the city to sell or lease the land to Sears, Roebuck and Co.[2] The petitioners, seeking to restrain a proposed sale or lease of the lands, brought a suit under the General Laws, Chapter 214, Section 3(11), which provides for suits to enforce the purposes of any gift or conveyance to a municipal corporation "for a specific purpose or purposes in trust or otherwise." The Court, relying heavily on the fact that the city had paid a substantial sum for the land, held that the words in the deed did not create a trust but merely stated the use to which the city intended to devote the land.

In three cases the Court was called upon to construe deeds creating easements. Two of the cases, *City of Revere v. Noonan* [3] and *Codman v. Wills,*[4] involved questions as to the scope and extent of the easements. The third case, *Kakas Bros. Co. v. Kaplan,*[5] required the Court to determine the present validity of an easement of light and air created by a deed executed more than one hundred years ago. In 1853 the trustees of a church society owned a tract of land in the city of Boston bounded by Chauncy and Bedford Streets. The society's church was then located on the corner of the lot. The trustees conveyed to one Perrin the southerly portion of the tract "saving and reserving to us Trustees as aforesaid for the benefit of said adjoining Church estate the right that no new outbuildings, or other structure shall ever be erected on the back part of the land hereby conveyed within thirty-eight feet of said back passageway which shall be higher than a point two feet six inches below the bottom of the Cap of the Vestry windows, in said Church."

In 1867 the land on which the church building stood was sold to private persons and in 1880 the building itself was removed and a new six-story building was erected on the site. In 1890 a five-story building was erected on the land conveyed to Perrin except that a one-story building was constructed on the land covered by the reservation in the Perrin deed. In course of time the whole area became devoted to commercial and industrial uses. The plaintiff, present owner through mesne conveyances of the parcel conveyed subject to the easement, desired to build above the one-story building and sought declaratory relief as to his right to do so.

The Court held that the reservation to the trustees in the deed to Perrin created a permanent, still subsisting easement of light and air over a portion of the plaintiff's land for the benefit of that portion of the original tract not conveyed to Perrin. The easement was created,

§1.2. [1] 1954 Mass. Adv. Sh. 141, 117 N.E.2d 539.
[2] Acts of 1951, c. 199.
[3] 1954 Mass. Adv. Sh. 51, 116 N.E.2d 566.
[4] 1954 Mass. Adv. Sh. 167, 118 N.E.2d 94.
[5] 1954 Mass. Adv. Sh. 353, 118 N.E.2d 877.

according to the Court's view, not for the benefit of the church building but for the benefit of the church land in order to enhance its value. The result reached is unfortunate in that it hampers maximum utilization of land in the business district of a large city. The decision rests largely on an inference as to the probable intention of the trustees with respect to continued use of the retained portion of the tract for church purposes. It would seem that a preferable construction of the language of the reservation would have been to interpret the reference to "Church estate" and "windows in said Church" as showing an intention to make the easement appurtenant only to the church edifice. This view gains support from the fact that new structures were limited in height by the reservation not in terms of absolute measurement, such as number of feet, but solely with respect to the height of the windows in the then existing church building. Easements of light and air are not favored in the law and even when created by express grant the words of the grant might well be strictly construed.[6] The decision in the instant case may, however, have been influenced by the practical construction put on the conveyance by the parties and their successors in interest as indicated by the conforming use made of the servient estate.[7]

**§1.3. Zoning decisions.** The most significant decision relating to the topic of zoning was undoubtedly that of *Pendergast v. Board of Appeals of Barnstable,*[1] wherein the Court held that the Superior Court, on the hearing of an appeal from a decision of a board of appeals of a city or town, lacks the power to order the granting of a variance. The case is discussed in detail in the chapter on administrative law.[2]

An interesting problem in rezoning was presented in *Caputo v. Board of Appeals of Somerville.*[3] The plaintiff owned a lot of land at 10 Tyler Street in the city of Somerville, where he conducted the business of fabricating, cutting, and processing steel. He also owned a vacant lot of land at 9 Tyler Street, directly across from his place of business. He made plans to use the vacant lot for storing iron and steel and applied for a permit to construct a traveling hoist and crane to be used for picking up and storing the iron and steel which would be unloaded from trucks onto the lot.[4] The permit was denied. The plaintiff brought suit to compel the issuance of a permit. At the time the permit was applied for, the plaintiff's vacant lot was included in a

[6] See Tidd v. Fifty Associates, 238 Mass. 421, 131 N.E. 77 (1921); Case v. Minot, 158 Mass. 577, 33 N.E. 700 (1893); Keats v. Hugo, 115 Mass. 204 (1874).

[7] See 5 Restatement, Property §483, Comment to Clause (d) (1944).

§1.3. [1] 1954 Mass. Adv. Sh. 633, 120 N.E.2d 916.

[2] Section 14.25 *infra.*

[3] 1954 Mass. Adv. Sh. 621, 120 N.E.2d 751.

[4] The facts stated are taken from the opinion in Caputo v. Board of Appeals of Somerville, 330 Mass. 107, 111 N.E.2d 674 (1953), and from the master's report in that case. There the Court remanded the suit to the Superior Court to allow the plaintiff to amend his bill so as to raise the question of the validity of the revised zoning ordinance enacted after the trial of the original suit.

large area zoned for light industry. Shortly thereafter the zoning ordinance was amended so as to change a relatively small area, including the plaintiff's vacant lot, from an Industry A District to a Residence B District. By amended bill the plaintiff attacked the validity of the new ordinance as spot zoning.

The Court held the rezoning ordinance illegal and void on the ground that it singled out "one small tract for different treatment from that accorded to similar surrounding land not shown to have been distinguishable from it in character, for no good reason unless it be to gratify one only of the owners in that tract." [5] The area which was changed to a residential district by the amendment consisted of a block bounded by four streets and comprising about 3.3 acres. Under the original zoning ordinance enacted by the city in 1925, part of this block was included in a business district and part in an industrial district. It was part of a general area zoned principally for industry. The block itself consisted of thirty lots predominantly residential in character.[6] At the time of the amendment, no lot in the block was being used for industrial purposes.[7]

Although the Court did not explicitly adopt the petitioner's contention that the case was one of spot zoning, a contention difficult to sustain in view of the number of lots contained in the block, it apparently thought that the same element of arbitrary action usually found in the spot zoning cases [8] vitiated the amendment in question. Whether the Court gave adequate consideration to factors that may have induced the city to make the change, such as potential increase in traffic congestion, safety to pedestrians, and prevention of noise, is debatable. Rather than applying a presumption in favor of the validity of the ordinance, the opinion appears to throw on the city the burden of showing that its action was not unreasonable.[9]

In a case of first impression, the Court in *Pioneer Insulation and Modernizing Corp. v. City of Lynn* [10] construed the meaning of a section in a zoning ordinance providing for loss of a nonconforming use

[5] It is to be noted that the Court is referring to a *possible* reason for the zoning change. The record itself does not support an inference that the change was made because one of the property owners in the area requested it. Compare the attitude of the Court in Simon v. Needham, 311 Mass. 560, 566, 42 N.E.2d 516, 519 (1942): "It cannot be assumed that the voters in following the recommendations of the [planning] board were activated by the reasons mentioned by the board. . . . We do not know what other considerations were advanced for the passage of the amendment. . . . The action of the voters is not to be invalidated simply because someone presented a reason that was unsound or insufficient in law to support the conclusion for which it was urged."

[6] Record, p. 8.

[7] Ibid.

[8] See, e.g., Smith v. Board of Appeals of Salem, 313 Mass. 622, 48 N.E.2d 620 (1943); Whittemore v. Building Inspector of Falmouth, 313 Mass. 248, 46 N.E.2d 1016 (1943); Leahy v. Inspector of Buildings of New Bedford, 308 Mass. 128, 31 N.E.2d 436 (1941). Cf. Marblehead v. Rosenthal, 316 Mass. 124, 55 N.E.2d 13 (1944).

[9] Cf. Lamarre v. Commissioner of Public Works of Fall River, 324 Mass. 542, 87 N.E.2d 211 (1949); Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942).

[10] 1954 Mass. Adv. Sh. 639, 120 N.E.2d 913.

by discontinuance for a specified time. The ordinance of the respondent city authorized nonconforming uses in existence at the time of its adoption and then recited: "When a non-conforming use has been discontinued for a period of one year, it shall not be re-established and future use shall be in conformity with this ordinance." The Court found it unnecessary to pass on the validity of this section of the ordinance because error of the trial court in another respect required that the case be remanded for a new trial. However, the Court thought it not "inappropriate to point out some of the factors to be considered in determining whether a non-conforming use has been discontinued." [11] The Court then went on to define "discontinued" as equivalent to abandoned and stated that for abandonment to occur there must be both the intent to abandon and voluntary conduct, affirmative or negative, which carries the implication of abandonment.[12] Nonoccupancy of premises and suspension or cessation of business due to reasons beyond the owner's control do not constitute a discontinuance, the Court asserted, and mere lapse of time is not the decisive factor.

**§1.4. Meaning of the term "lot" in a zoning ordinance.** When a zoning ordinance, in restricting the uses to which land may be put, speaks in terms of a "lot," does the word "lot" mean: (1) a subdivision shown on a plat or map, (2) a parcel of land under single ownership irrespective of plats and surveys, or (3) an area put to a specific use? Generally the word has no fixed and inflexible meaning. It derives its meaning from its context and the particular circumstances under which it is used.[1] And a "lot" may include two lots, as illustrated by *Vetter v. Zoning Board of Appeal of Attleboro.*[2] In that case an ordinance of the respondent city adopted in 1942 prohibited the future erection in single residence districts of a dwelling house "on a lot" containing less than 12,000 square feet, "but nothing contained in this section shall prevent the erection . . . of any building on any lot . . . containing a smaller area, provided such lot on the effective date hereof does not adjoin other land of the same owner available for use in connection with said lot." The ordinance further recited: "No lot on which a dwelling house . . . is situated, whether heretofore or hereafter placed, shall be reduced in area if such lot is smaller than is hereby

[11] 1954 Mass. Adv. Sh. at 642, 120 N.E.2d at 916.

[12] Cases from other jurisdictions are in accord with this view. Ullman v. Payne, 127 Conn. 239, 16 A.2d 286 (1940); Wood v. District of Columbia, 39 A.2d 67 (Mun. Ct. App. D.C. 1944); Haller Baking Company's Appeal, 295 Pa. 257, 145 Atl. 77 (1928).

§1.4. [1] Corden v. Zoning Board of Appeals of Waterbury, 131 Conn. 654, 41 A.2d 912 (1945); Lehmann v. Revell, 354 Ill. 262, 188 N.E. 531 (1933); Burde v. City of St. Joseph, 130 Mo. App. 453, 110 S.W. 27 (1908). The Massachusetts Subdivision Control Law defines lot as meaning "an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings." G.L., c. 41, §81L; cf. §81Q.

[2] 330 Mass. 628, 116 N.E.2d 277 (1953).

prescribed, or if by such reduction it would be made smaller than is hereby prescribed."

At the time this ordinance took effect the plaintiff owned a tract in a single residence district comprising lots 11 and 12 as shown on a plat on file at the assessors' office. He had acquired the so-called "lots" from different sources of title and at different times. Each lot contained slightly more than 6000 square feet. On "lot 11" was located a house and garage. In 1944 the plaintiff sold "lot 11" and later desired to build on "lot 12." He was refused a building permit and denied a variance. The Court sustained the action of the board of appeal on the ground that on the effective date of the ordinance the whole tract owned by the plaintiff constituted one lot containing more than 12,000 square feet and, therefore, the saving provision for smaller lots was inapplicable. The Court was of the opinion that the purpose of the exception in the ordinance was "to save a person who at the time when the ordinance took effect had a vacant tract of a total area less than 12,000 square feet from the hardship of not being able to use it at all for residence purposes"; the Court also said, "We find nothing in this record to suggest that lots under the ordinance were to be determined by assessors' plans or assessments or according to sources of title." [3] It is clear that the Court was primarily concerned with effectuating the basic purpose of the ordinance despite the obstacles of defective draftsmanship.[4]

**§1.5. Legislative developments.** Two statutes[1] designed to modernize the law of real property in areas in need of reformation were enacted during the 1954 legislative session. The first of these statutes represents a skillfully executed attack on some of the anomalies and hypertechnical applications of the Rule Against Perpetuities.[2] In the process of eliminating some of the "rules" that have encrusted the Rule, the statute imposes a time limit on the duration of possibilities of reverter and rights of entry for condition broken arising from the creation of determinable fees and fees on condition subsequent.[3]

The second statute streamlines conveyances between husband and

[3] 330 Mass. at 630, 116 N.E.2d at 278.

[4] For a comparable result reached under the mechanic's lien statute, see Orr v. Fuller, 172 Mass. 597, 52 N.E. 1091 (1899); Batchelder v. Rand, 117 Mass. 176 (1875); Menzel v. Tubbs, 51 Minn. 364, 53 N.W. 653 (1892).

§1.5. [1] Acts of 1954, c. 641, adding Chapter 184A to the General Laws; Acts of 1954, c. 395.

[2] For a detailed discussion of the statute by one of the draftsmen, see Section 3.1 *infra*.

[3] Chapter 184A, §3. Cf. G.L., c. 184, §23 (limiting to the term of thirty years "Conditions or restrictions, unlimited as to time"). See Flynn v. Caplan, 234 Mass. 516, 126 N.E. 776 (1920). The new statute takes effect on January 1, 1955, and is prospective in operation. Additional legislation is necessary to deal with the problem of presently existing possibilities of reverter and rights of entry created under ancient deeds and wills. A draft of a statute directed toward this problem will probably be introduced in the 1955 legislative session.

wife by authorizing the creation of a tenancy by the entirety by a direct conveyance from a husband to himself and his wife.[4]

**§1.6. Miscellaneous problems.** The failure of a register of deeds, acting as assistant recorder of the Land Court, to enter an order of taking of land in the daily sheet or entry book was held not to invalidate the taking in *L. L. Brown Paper Co. v. Department of Public Works.*[1] In holding that the performance of his statutory duty by the register is not a condition precedent to the validity of registration, the Court said: "It is the duty of the assistant recorder to comply with the statutes when a paper is offered for filing and registration. If a party presenting a paper, in this case the department, does all that is required of it to cause the paper to be filed and registered, there is no further obligation on such party to follow up or supervise the performance by the assistant recorder of his official duty." [2] The Court was careful to point out that no rights of third parties were involved.[3]

The capacity of foreign trustees to convey Massachusetts land arose in *Assessors of Everett v. Albert N. Parlin House, Inc.*[4] The Court applied the general rule that a foreign trustee has no authority to convey land in another state, apart from statutory permission granted by the state of the situs, even though the land in question was not land owned by the testator but had been purchased by the trustees in the course of administering the trust.[5] It may well be that the holding can be explained by the fact that the issue of capacity to convey arose in a tax abatement proceeding with the burden of proof resting "upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption." [6]

## B. Landlord and Tenant

**§1.7. Covenant of renewal of lease.** The recurrent and important problem of the rights of a lessee who has duly exercised a privilege of renewal but has not obtained a new written lease or a formal extension of the old lease was presented in *O'Brien v. Hurley.*[1] One Newton

[4] Acts of 1954, c. 395. For further discussion of this statute see Section 2.12 *infra.*

§1.6. [1] 330 Mass. 496, 115 N.E.2d 496 (1953).
[2] 330 Mass. at 501, 115 N.E.2d at 499.
[3] See Gillespie v. Rogers, 146 Mass. 610, 16 N.E. 711 (1888).
[4] 1954 Mass. Adv. Sh. 389, 118 N.E.2d 861.
[5] The trustees could have obtained, it would seem, a license from the Probate Court to sell the land. G.L., c. 203, §17A.
[6] 1954 Mass. Adv. Sh. 389, 393, 118 N.E.2d 861, 864.

§1.7. [1] 1954 Mass. Adv. Sh. 189, 117 N.E.2d 922. The same case was before the Court in O'Brien v. Hurley, 325 Mass. 249, 90 N.E.2d 335 (1950). In that case the plaintiff-lessee sought specific performance of an option to purchase contained in the lease. The option granted was exercisable "at any time during the term of this lease." Relief was denied on the ground that after the expiration of the original term of the lease there had been no extension of the term despite the fact that the lessee had duly given notice of the exercise of his option to renew the lease.

leased to the plaintiff certain premises for a term of two years commencing on April 1, 1938. The lease gave to the lessee "the right or option of renewal of the within lease" for a further term of eighteen years at a higher rental, provided the lessee gave the lessor written notice of his election to renew "at least sixty days before the expiration of this lease . . ." In addition, the lease gave the lessee an option to purchase "at any time during the term of this lease" at a specified price. In October, 1939, the lessee gave to the lessor's agent and attorney in fact a written notice of his desire to renew the lease. This agent informed both the lessor and the lessee that this notice constituted a renewal of the lease and thereafter both parties to the lease assumed that the lessee was occupying the premises under a renewal of the lease. The plaintiff has continued in possession ever since.

In April, 1948, the lessor conveyed the reversion to the female defendant. The purchase and sale agreement recited that the premises were to be conveyed "free from all encumbrances except the lease now held by Mr. O'Brien" and possession of the premises was to be delivered to the grantee "free of all tenants, except for such tenancy created by the said lease . . ." [2] The land had previously been registered, and the certificate of title listed under encumbrances the lease to the plaintiff "2 yrs. fr. April 1, 1938 (with option of renewal & option to purchase)." The deed to the defendant recited that the conveyance was subject to leases mentioned in the grantor's certificate of title. The plaintiff demanded that the defendant convey the premises to him in accordance with the terms of the option to buy. On her refusal the plaintiff brought this bill to enforce both the option to renew and the option to purchase. The trial judge entered a decree ordering the grantee to execute a renewal lease in favor of the plaintiff but otherwise denying relief to the plaintiff. Both parties appealed.

The Court reversed the decree and ordered the bill dismissed on the ground that in order to bind the parties to the lease "for the further term it was necessary for the plaintiff to show that he had either a new lease for the additional term or a formal extension of the existing lease or something equivalent thereto." [3] By his occupancy after the initial term the lessee became a tenant at will. "There was no renewal or extension of the lease and the holding over by O'Brien under what at most was an implied oral agreement with Newton cannot be enforced against the female defendant who without notice of such agreement purchased the property more than eight years after the expiration of the lease." [4] The decision, though buttressed by the authority of prior cases, ignores the doctrines of specific performance and equitable conversion. The lessee, having given the prescribed notice of his election to renew the lease, had a specifically enforceable right to a new lease.[5] If, upon

[2] Record, pp. 278, 279.
[3] 1954 Mass. Adv. Sh. 189, 191, 117 N.E.2d 922, 923.
[4] 1954 Mass. Adv. Sh. at 192, 117 N.E.2d at 924.
[5] Linden Park Garage v. Capitol Laundry Co., 284 Mass. 454, 187 N.E.2d 849 (1933); Judkins v. Charette, 255 Mass. 76, 151 N.E. 81 (1926); Leominster Gas Light Co. v.

the expiration of the original term, the lessor had brought an action of summary process to recover possession, the lessee would have had an effective equitable defense to the action.[6] It is difficult to understand how the lessee lost his equitable right to a new lease. The defendant grantee, if not chargeable with actual notice of the plaintiff's rights, was chargeable with notice of those facts which an inquiry of the lessee would have disclosed.[7]

Much of the confusion in the cases dealing with a lessee's right of renewal results from a failure to distinguish between a case where the lease prescribes the method of exercising the option and the lessee complies with the required formalities and one where the lease gives a right of renewal in general terms and the lessee holds over without affirmatively exercising the option. In the leading case of *Leavitt v. Maykel*,[8] for example, the lease gave the lessees "the privilege and right to renew this lease after its expiration, for the further term of two years, upon the same terms and conditions of this lease." At the end of the term, the lessees remained in possession for eight months and then vacated, giving the lessors only three days' notice of their intention to quit. The lessors brought an action to recover rent for the next two months on the ground that the lessees had renewed the lease by holding over and paying rent. It was held that the lease had not been renewed and that the defendants' only liability was as tenants at will. The actual basis of the decision appears in the Court's statement that "what occurred was not equivalent to an arrangement that the term should be extended and both parties bound for two years more." [9] The Court's statement that "without a formal renewal or something equivalent to it" [10] the term was not extended was not inappropriate in view of the facts, but it has been uncritically applied in later cases to basically different situations.

Thus, in *Hanna v. County of Hampden*[11] the Court ignored the fact that the lessee had exercised the option to renew by giving written notice to the lessor, and held that after the expiration of the original term the lessee was at most a tenant at will and therefore not entitled to

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Hillery, 197 Mass. 267, 83 N.E. 870 (1908); Ferguson v. Jackson, 180 Mass. 557, 62 N.E. 965 (1902). Cf. Baseball Publishing Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362 (1938); see also 1 American Law of Property §3.86 (1952).

[6] Ferguson v. Jackson, 180 Mass. 557, 62 N.E. 965 (1902).

[7] Cunningham v. Patee, 99 Mass. 248, 252 (1868): "The authorities fully support the doctrine in equity that one who purchases an estate, knowing it to be in the possession of a tenant, is bound to inquire into the nature of the tenant's interest, and will be affected with notice of the extent thereof. According to this principle, the known possession of the plaintiff as tenant was sufficient notice to Stevens [the transferee of the lessor] of the fact that she had a written lease, and of its contents, including the covenant to renew." And see Leominster Gas Co. v. Hillery, 197 Mass. 267, 83 N.E. 870 (1908).

[8] 203 Mass. 506, 89 N.E. 1056 (1909).

[9] 203 Mass. at 510, 89 N.E. at 1058.

[10] 203 Mass. at 509, 89 N.E. at 1057.

[11] 250 Mass. 107, 145 N.E. 258 (1924).

damages for the taking of the property by eminent domain. The Court relied exclusively on the *Leavitt* case, *supra,* and stated that it was decisive of the case at bar. The *Hanna* case, in turn, was relied on in *Wit v. Commercial Hotel Co.*[12] and *D. A. Schulte, Inc. v. Brockton Y.M.C.A.*[13] Although none of these cases involved the right of the lessee to specific performance, they were cited by the Court in the *O'Brien* case as authority for the proposition that it was necessary for the plaintiff "to show that he had either a new lease for the additional term or a formal extension of the existing lease or something equivalent thereto." [14]

**§1.8. Covenants to indemnify the lessor.** Indemnity clauses in leases whereby the lessee agrees to hold harmless the lessor from assorted acts of negligence on the part of the lessor are a peculiarly hardy breed of covenant. In 1945 the legislature decided to outlaw them as "against public policy," but the statute was expressly made applicable "only to leases and rental agreements entered into" after October 1, 1945.[1] Indemnity covenants in pre-existing leases continue to be valid, and in *Manaster v. Gopin,*[2] decided in 1953, it was held that the statute did not make void such a covenant during the term of an extension of the original lease, even though the extension became effective after the cut-off date of the statute. In that case two floors of a building were leased to the plaintiffs' testator for a term of two years beginning on September 1, 1944, with a right in the lessee "to renew this lease for the further term of three years on the same terms and conditions of this indenture. And failure of the Lessee to give notice in writing to the Lessor one hundred days prior to the expiration of the term herein provided of his intention to vacate the premises by him occupied, at the expiration of the term, shall constitute a renewal of this lease as is herein provided." [3] The lease also contained a covenant on the part of the lessee to save the lessor harmless from loss or damage occasioned by the escape of water on the premises or by the bursting of pipes. The lessee, and on his death the plaintiff executors, continued to occupy the premises until February, 1948. No written notice of intention to vacate at the end of the original term was given to the lessor. In February, 1948, damage to personal property of the plaintiffs was caused by a broken steam pipe, and an action was brought against the lessor to recover for the damage.

The Court held that the indemnity covenant barred recovery because the original lease was in effect at the time of the damage to the plaintiffs' property. The Court construed the automatic renewal clause of the lease as amounting to an extension rendering unnecessary "the

[12] 253 Mass. 564, 149 N.E. 609 (1925).
[13] 273 Mass. 335, 173 N.E. 414 (1930).
[14] 1954 Mass. Adv. Sh. 189, 191, 117 N.E.2d 922, 923.

§1.8. [1] Acts of 1945, c. 445, §2.
[2] 330 Mass. 569, 116 N.E.2d 134 (1953).
[3] 330 Mass. at 570, 116 N.E.2d at 135.

formality of executing a new lease." [4] Alternatively, the Court stated that the lease could well be treated as one for five years terminable by the lessee at the end of two years by giving notice of intention to vacate.[5]

**§1.9. Assignment of leases.** The right of an assignee of a lease to rid himself of the obligation of the covenants in the lease by making a further assignment to a person carefully selected for his financial irresponsibility was reaffirmed in 1954 in *Shoolman v. Wales Manufacturing Co.*[1] Since normally the only basis of the assignee's liability to pay rent and to perform the other covenants of the lease running with the land is that of privity of estate, it is elementary that a further assignment of the leasehold by the assignee extinguishes his liability. The original lessee continues, of course, to be liable to the lessor on a contractual basis despite his assignment.[2] And the lessor may protect himself against a rent-evading assignment by the first assignee by providing in the lease that no assignment shall be made without his written consent and then requiring as a condition of that assent that the assignee expressly assume the covenants in the lease.[3]

Whether an alleged transfer of his estate by the assignee amounts to an effective assignment of the leasehold is often a disputed question, as it was in the *Shoolman* case. The instrument of assignment must be delivered to the second assignee and must vest in the latter the right to possession for the unexpired residue of the term without the retention of a reversionary interest in the transferor. If the assignment is not under seal, an actual entry by the assignee is necessary to make the transfer effective.[4]

[4] 330 Mass. at 572, 116 N.E.2d at 137. Compare O'Brien v. Hurley, 1954 Mass. Adv. Sh. 189, 117 N.E.2d 922, discussed in Section 1.7 *supra*. The opinion contains no discussion of whether the failure of the lessee to give notice of an intention to vacate constituted a "rental agreement" within the meaning of Section 2 of Chapter 445 of the Acts of 1945.

[5] See 1 American Law of Property §3.86 (1952).

§1.9. [1] 1954 Mass. Adv. Sh. 233, 118 N.E.2d 71. *Accord:* 68 Beacon St. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935); Donaldson v. Strong, 195 Mass. 429, 81 N.E. 267 (1907); and see 1 American Law of Property §3.61 (1952).

[2] Walker v. Rednalloh Co., 299 Mass. 591, 13 N.E.2d 394 (1938); Mason v. Smith, 131 Mass. 510 (1881); see 1 American Law of Property §3.61 (1952).

[3] This was done in 68 Beacon St. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935), and the Court held that the assignee continued to be liable on his own covenants despite a subsequent assignment by him. Under the rule of Dumpor's Case, 4 Coke 119b, 76 Eng. Rep. 1110 (K.B. 1603), a consent by the lessor to one assignment destroys his right to object to a further assignment. In Aste v. Putnam's Hotel Co., 247 Mass. 147, 141 N.E. 666 (1923), the Court adopted the rule of Dumpor's Case. It is not clear whether the lessor, in order to avoid the rule, can effectively condition his assent to the assignment with a provision that there shall be no further assignment. See 1 American Law of Property §3.58 (1952).

[4] Gorin v. Stroum, 288 Mass. 6, 192 N.E. 90 (1934); Sanders v. Partridge, 108 Mass. 556 (1871). In the Shoolman case the Court emphasized the fact that the instrument of assignment was under seal. It is difficult to see in principle why a seal should make any material difference.

**§1.10. Governmental rent control.** The constitutionality of the Massachusetts Rent Control Act was upheld in *Russell v. Treasurer and Receiver General.*[1] A petition by twenty-five taxable inhabitants was brought to enjoin the expenditure of state funds to carry out the purposes of the statute (Acts of 1953, Chapter 434) on the ground that the act deprived owners of controlled housing accommodations of due process and of equal protection of the laws. The principal attack was leveled at those provisions of the statute exempting from control newly constructed, changed or converted housing, vacant housing, and housing renting for more than $150 per month.[2] The Court held that the statutory classification was not arbitrary and that the act considered in its entirety "establishes a system of rent control which is reasonably calculated to increase the number of residential housing units of the class in which there is the most pronounced shortage and by gradually relieving the existing emergency to promote a return of the housing situation to a more normal basis." [3]

The plan adopted by the legislature in its effort to cushion the impact of decontrol of housing accommodations was to make control a matter of local option and local administration. From the administrative standpoint the system is one of municipal rent control rather than state rent control.[4] The statute does prescribe maximum rents and civil and criminal penalties, but broad powers are given to the local rent boards to make individual and general adjustments of maximum rents, and even to remove rent ceilings from any class of accommodations. The function of the state is limited to reimbursing those cities and towns which elected to retain rent control in the amount of 40 percent of expenditures, and in furnishing the services of a rent coordinator. The only powers of the rent coordinator are to prescribe forms, to advise local boards, and to approve and certify expenditures of the boards.[5] The lack of any supervisory power in the coordinator, plus the absence of any reporting requirement by the local boards, makes difficult any attempt to evaluate the act in operation. It has undoubtedly been successful in preventing sudden and extreme increases in rent in those cities and towns where rent control has been retained. It is probable that thousands of individual adjustments of rent have been made by the rent boards on applications of landlords but no statistics are available. Nor is it known how many, if any, complaints have been

§1.10. [1] 1954 Mass. Adv. Sh. 571, 120 N.E.2d 388.

[2] Acts of 1953, c. 434, §2(b)3.

[3] 1954 Mass. Adv. Sh. 571, 578, 120 N.E.2d 388, 392.

[4] As of December 1, 1954, rent control was in force in thirty-one cities and nineteen towns in the Commonwealth.

[5] The state rent coordinator may, according to an informal opinion of the Attorney General, withhold approval and certification of expenditures if in his judgment they are excessive. Informal Opinions of the Attorney General, November 12, 1953. In another informal opinion the Attorney General ruled that the powers and functions of the office of state housing rent coordinator did not terminate on June 30, 1954, but by virtue of the Acts of 1954, c. 496 (extending rent control for an additional nine months) continue to March 31, 1955. Informal Opinions of the Attorney General, July 15, 1954.

entered in the District Courts under Section 6 of the act by persons "aggrieved by any action, regulation or order of the rent board." The vacuous provision that a District Court "shall be authorized to take such action with respect thereto as is provided" in the declaratory judgment statute[6] poses an interesting, but as yet unaswered, question as to the scope of judicial review of the administrative action of the rent board.

## C. Personal Property

**§1.11. Problems of possession.** Relatively few cases in the field of personal property came before the Court during the survey year. Of these one of the most interesting is *Stuart v. D. N. Kelley & Son, Inc.*,[1] dealing with the problem of the existence of a bailment. In that case the plaintiff owned a fishing vessel which he delivered to the defendant's shipyard for repairs. The boat had just returned from a fishing trip, and in a locked compartment on the boat were fishermen's clothing and supplies. This property was stolen during a period when no watchman was on duty. The plaintiff brought an action of contract or tort to recover the value of the stolen property. The trial judge found and ruled that a bailment for the mutual benefit of both parties was created, that the defendant knew "or it is reasonable to assume that it should have known that a large fishing boat . . . is very likely to have . . . fishing clothes and foodstuffs aboard," [2] and that the theft was due to the defendants' negligence. The judge found for the plaintiff and denied a request by the defendant for a ruling that the defendants' duty with respect to the stolen property "would rise no higher than a gratuitous bailee." [3]

The Court held that the denial of the requested ruling was error on the ground that the evidence supported neither a finding that the defendant actually knew that the plaintiff's property was aboard the vessel nor a finding that the defendant had reason to know that this property was aboard, and that in the absence of such knowledge, express or implied, there was no bailment for hire. Because of the form of the defendants' requested ruling the decision was restricted to a holding that there was no bailment for hire, but it is clear from the opinion that the Court was of the view that there was not even a gratuitous bailment. The Court stated, somewhat cautiously, that knowledge or consent on the part of the bailee is no less essential for the creation of a gratuitous bailment than of one for hire.[4] On the facts it would seem that the defendant was an involuntary bailee of the

[6] G.L., c. 231A.

§1.11. [1] 1954 Mass. Adv. Sh. 83, 117 N.E.2d 160.
[2] 1954 Mass. Adv. Sh. at 84, 117 N.E.2d at 161.
[3] 1954 Mass. Adv. Sh. at 85, 117 N.E.2d at 162.
[4] The Court conceded that there were intimations to the contrary in D. A. Schulte, Inc. v. North Terminal Garage Co. 291 Mass. 251, 257, 197 N.E. 16, 20 (1935) and Rogers v. Murch, 253 Mass. 467, 471, 149 N.E. 202, 203 (1925).

plaintiff's clothing and supplies because of his possession of the boat and its contents,[5] but as involuntary bailee the defendant would not be liable for the loss of the goods.[6] Only rarely does unwitting possession serve as a basis of civil liability.

But that an unwitting possession may be the basis of criminal liability is illustrated by *Commonwealth v. Lee*.[7] In that case the defendant was found guilty on a complaint charging her with being found in possession of marijuana in violation of General Laws, Chapter 94, Section 211. At the trial the Commonwealth introduced evidence that the defendant received from a mail carrier a small package, wrapped in brown paper, addressed to the defendant. Police officers saw the delivery of the package to the defendant and immediately interrogated her while she had the package unopened in her hand. At the direction of the officers she opened the package. It contained four marijuana cigarettes. An officer asked her if they were marijuana and she answered, "Yes, marijuana. Somebody's trying to frame me."

Adopting the definition of possession of a chattel as set forth in the Restatement of Torts,[8] the Court held that the evidence warranted a finding that the defendant had possession of the cigarettes. The Court thought it unnecessary to consider "whether there was sufficient evidence that the defendant knew or had reason to believe that the package contained marijuana, until she opened it," because "We are unable to distinguish in principle the present case from the *Mixer* case." [9]

In the *Mixer* case it had been held that a common carrier or his servant could be convicted of illegally *transporting* intoxicating liquor in a barrel although he did not know, and had no reason to believe, that it contained such liquor. No problem of possession arose in the *Mixer* case. The reliance on the *Mixer* decision by the Court in the *Lee* case demonstrates the Court's view that the crime with which the defendant was charged does not require a specific intent or consciousness of the nature of the act, but to say that the case is indistinguishable from *Mixer* blurs the distinction between the statutes involved in the two cases. When the legislature uses a word of variable meaning such as "possession," it is open to inquiry whether the word

[5] "A bailment may be defined as the rightful possession of goods by one who is not the owner." 4 Williston, Contracts §1032 (rev. ed. 1936). As to the point of possession, see Commonwealth v. Lee, 1954 Mass. Adv. Sh. 181, 117 N.E.2d 830; 1 Restatement, Torts §216 (1934).

[6] Sawyer v. Old Lowell National Bank, 230 Mass. 342, 119 N.E. 825 (1918).

[7] 1954 Mass. Adv. Sh. 181, 117 N.E.2d 830.

[8] The Restatement defines a person in possession of a chattel as "one who has physical control of a chattel with the intent to exercise such control on his own behalf, or, otherwise than as servant, on behalf of another . . ." §216. The difficulty, of course, lies in the meaning of the word "intent." Does a person who has possession of a container also have possession of its contents when they are unknown to him? The Court thought not in D. A. Schulte, Inc. v. North Terminal Garage Co., 291 Mass. 251, 257, 197 N.E. 16 (1935), but that case would not necessarily control the Lee case because of the size of the container and other circumstances.

[9] 1954 Mass. Adv. Sh. 181, 183, 117 N.E.2d 830, 832. The case referred to by the Court is Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910).

is used in the sense of knowing possession or possession without regard to a specific intent to control. The question is always one of legislative intent to be determined from the legislative history, the over-all objective of the statute, the evil at which it is aimed, and the probable consequences of one construction as opposed to the other.[10] Because of the serious evil of the drug traffic and the unlikelihood that an innocent person would be in unknowing possession of a prohibited drug, the result reached in the *Lee* case is undoubtedly sound, but the technique used in reaching that result is debatable.

**§1.12. Fixtures.** A single case involving fixtures called for the application of well-established rules to a factual situation representative of the growth and development of a new industry. In *Bay State York Co. v. Marvix, Inc.*[1] the Court held that four air-conditioning units and a water tower installed in an office building by the owner of the building remained personal property as against a purchaser of the realty at a foreclosure sale under a prior mortgage.

The Court, recognizing that the decisive question was the objectively manifested intent of the owner, was of the opinion that "the installation was probably tentative and in the nature of an experiment." [2] The plaintiff, who was the conditional seller of the equipment, was held entitled to remove it from the building.

[10]Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910) passim.

§1.12. [1] 1954 Mass. Adv. Sh. 459, 119 N.E.2d 727.
[2] 1954 Mass. Adv. Sh. at 464, 119 N.E.2d at 730.