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PART I

Private Law

CHAPTER 1

Property and Conveyancing

CORNELIUS J. MOYNIHAN *and* FREDERIC B. DAILEY

A. REAL PROPERTY

§1.1. Landlord and tenant: Covenant to repair. Leases of industrial and commercial property, when the lease is of the entire premises, commonly contain a covenant obligating the lessee to make repairs to the demised premises. Actions by lessors to recover damages for breach of these covenants are relatively rare. Controversies between the parties with respect to the condition of the premises are more likely to arise after the expiration of the term and then the lessor's claim for damages is usually based upon alleged breach of the standard redelivery covenant.[1]

The recent case of *Corbett v. Derman Shoe Co.*,[2] involving an action by the lessors to recover damages for breach of a repair covenant, contains an exceptionally thorough and valuable discussion of the mean-

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Mr. Moynihan is responsible for the discussion of decisions of the Supreme Judicial Court (Topics A and C) and Mr. Dailey is responsible for the discussion of legislation (Topic B).

§1.1. [1] See, e.g., Codman v. Hygrade Food Products Corp., 295 Mass. 195, 3 N.E.2d 759 (1936); Weeks v. Wilhelm-Dexter Co., 220 Mass. 589, 108 N.E. 365 (1915). For cases where breach of the repair covenant was asserted by the lessor as a ground for forfeiture of the lease, see Kaplan v. Flynn, 255 Mass. 127, 150 N.E. 872 (1926); Atkins v. Chilson, 9 Metc. 52 (Mass. 1845).

[2] 338 Mass. 405, 155 N.E.2d 423 (1959).

ing of such a covenant, of the appropriate measure of damages for breach, and of the burden of proof on the matter of damages. In 1940 the parties executed a lease of an industrial building, apparently on a year-to-year basis. The lease contained both a repair covenant and a redelivery covenant. The repair covenant recited:

> The Lessors covenant that they will, at their own cost and expense, make repairs, both outside and inside the buildings . . . to an amount in all not exceeding . . . $500 . . . per year and the Lessee covenants that it will at its own cost and expense make all repairs in excess of said . . . $500 . . . necessary to keep the premises in such repair, order and condition as the same are at the commencement of this lease, damage by fire and casualty excepted.

The redelivery clause required the lessee "to quit and deliver up the premises to the Lessors . . . at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into, by the said Lessors. . . ." The action was brought in 1950 but the lease was not terminated until 1953. The lessee had failed to make repairs and in 1950 the premises were in a state of disrepair. The auditor, to whom the case had been referred, found that the cost of repairs necessary to put the premises in their 1940 condition was $9400, without taking into consideration reasonable wear and tear.

At the outset the Supreme Judicial Court was faced with the problem of construing the repair covenant. The exception clause in that covenant made no reference to reasonable use and wearing but the redelivery covenant expressly included that factor among the exceptions. The Court held that the two clauses must be read together and ruled that the lessee's obligation was

> to make whatever repairs were necessary to maintain the 1940 condition of the premises, so far as the lessors' $500 per year did not serve to do so, at such times as a policy of prudent management would dictate, so that the lessors would receive back their building in substantially as good condition as in 1940, except . . . for the effect, notwithstanding the making of such repairs, of reasonable use, exposure to the elements, and aging.[3]

In holding that the exception as to reasonable use and wearing qualified both covenants the Court refused to take the further step of treating the repair clause as merged in the redelivery covenant and imposing no affirmative obligation on the lessee.[4]

The Court then rejected the argument that the action was premature because brought prior to the end of the term and held that the repair

[3] 338 Mass. at 409, 155 N.E.2d at 426.

[4] In adopting this view the Court found it necessary to distinguish, if not to modify, Ball v. Wyeth, 8 Allen 275 (Mass. 1864), and Judkins v. Charette, 255 Mass. 76, 151 N.E. 81 (1926).

covenant was broken "whenever during the term the defendant failed to make, within a reasonable time, such repairs as it was bound to make." [5] The burden of proving what part of the disrepair was due to "reasonable use and wearing" was held to be on the lessee and since no evidence had been introduced on this point the auditor's finding of $9400 as the cost of restoring the premises to their 1940 condition was accepted as the amount of damages. If the exception as to reasonable use and wearing had been inserted in the repair covenant itself, rather than in the separate redelivery clause, the burden of proof, according to the Court, would have been on the lessors to establish the amount of disrepair not falling within the exception.[6]

Normally, when an action for breach of a covenant to repair is brought during the term the measure of damages is the diminution in market value of the reversion, not the cost of repairs. Although the cost of repairs may be recovered when the action is brought after the end of the term, to allow the lessor such recovery during the term may give him more damages than he is entitled to, since if the lessee had made repairs the repaired premises would have been returned to the landlord at the expiration of the lease lessened in value by reasonable wear and use.[7] The Court recognized this rule but held that on the facts of the case the lessors would not be overcompensated by allowing them the reasonable cost of repairs since the lease had come to an end in 1953 (prior to the trial of the case) and no repairs had been made by the lessee between 1950 and 1953.[8]

§1.2. Easement by prescription: Necessity of claim of right. It has been frequently stated that to acquire an interest by adverse possession or adverse user it is necessary that the claimant occupy or use the land "under a claim of right." [1] The phrase is, at best, an ambiguous one.[2]

[5] 338 Mass. 405, 411, 155 N.E.2d 423, 427 (1959). For an apparently contrary dictum, see Atkins v. Chilson, 9 Metc. 52, 63 (Mass. 1845).

[6] The faulty draftsmanship of the repair covenant, from the lessee's standpoint, is obvious. Because of the practical difficulty of establishing the amount of disrepair due to the reasonable use and wear the issue of burden of proof becomes important.

[7] Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687 (2d Cir. 1926); Watriss v. First National Bank of Cambridge, 130 Mass. 343 (1881); Appleton v. Marx, 191 N.Y. 81, 83 N.E. 563 (1908). Cf. Crystal Concrete Corp. v. Town of Braintree, 309 Mass. 463, 35 N.E.2d 672 (1941).

[8] No evidence had been introduced as to diminution of market value by reason of failure to make repairs. A substantial discrepancy between diminution in market value of the reversion and the cost of repairs might have rendered the cost of repairs an inappropriate measure of damages. Crystal Concrete Corp. v. Town of Braintree, 309 Mass. 463, 35 N.E.2d 672 (1941); Hopkins v. American Pneumatic Service Co., 194 Mass. 582, 80 N.E. 624 (1907).

§1.2. [1] "It is elementary law that adverse possession which will ripen into a title must be under a claim of right . . . or, as it has been thought more accurate to say, 'with an intention to appropriate and hold the same as owner, and to the exclusion, rightfully or wrongfully, of everyone else.'" Bond v. O'Gara, 177 Mass. 139, 143-144, 58 N.E. 275, 276 (1900). And see Shoer v. Daffe, 337 Mass. 420, 149 N.E.2d 625 (1958); Leavitt v. Elkin, 314 Mass. 396, 49 N.E.2d 1020 (1943). In Gower v. Town of Saugus, 315 Mass. 677, 681, 54 N.E.2d 53, 56 (1944), it was said: "In order to acquire a public way by prescription it must appear, as in the case of a

It at least implies that the mental attitude of the claimant is legally significant in addition to, or independently of, his intention as manifested by his conduct. And when there is an inconsistency or discrepancy between the actual conduct of the claimant and his uncommunicated mental attitude the phrase becomes a troublemaker.

In *Ottavia v. Saverese*[3] the Supreme Judicial Court in effect rejected the necessity of a "claim of right" as a requirement in addition to adverse user for acquisition of an easement by prescription and held that the uncommunicated mental attitude of the claimant is irrelevant when his conduct manifests the adverse character of his user. The plaintiff and the defendant owned adjacent lots on each of which was a brick building. Between the buildings was a light shaft located entirely on the defendant's land. Sometime prior to 1927 the defendant's predecessors in title built a one-story room in the light shaft by roofing over the area. The roof of this room rested against the wall of the plaintiff's building and four of the beams supporting this roof intruded into the wall of the building. The plaintiff acquired title to her property in 1937 and the defendant became the owner of her lot in 1939. In 1955 the defendant built a second story atop the existing room in the light shaft and further encroached on the plaintiff's wall at the new roof level of the second story.[4] The plaintiff sought injunctive relief.

The master found with respect to the original one-story room that it "had been used by the defendant or her lessees or predecessors in title openly, exclusively, adversely and hostilely since 1927" and that by 1955 "the defendant had acquired a prescriptive right to the wall of the plaintiff's building for a height of one story more or less, and to the interior of the plaintiff's wall where the four beams supporting the roof over this room were placed." But he also found as a subsidiary fact that "the defendant did not know that the joists or beams [supporting the roof of the original room] were intruded into the plaintiff's wall but she did know that there was a roof resting on the plaintiff's

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private way, that the use was adverse to the owner, that is, under an apparent claim of right."

[2] This is recognized in some jurisdictions. In Guaranty Title and Trust Corp. v. United States, 264 U.S. 182, 204, 44 Sup. Ct. 252, 253, 68 L. Ed. 636, 638-639 (1924), the Court said: "Sometimes misapprehension arises from the somewhat misleading, if not inaccurate, terms frequently used, such as 'claim of right,' 'claim of title,' and 'claim of ownership.' 'These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own, to the exclusion of all others.'" Section 457 of the Restatement of Property avoids the use of the phrase "claim of right" and requires for the creation of an easement by prescription only that the use be adverse, and, for the period of prescription, continuous and uninterrupted.

[3] 338 Mass. 330, 155 N.E.2d 432 (1959).

[4] The master found that the use made of the plaintiff's wall in connection with the construction and use of the new second-story room was an intentional and open trespass. The trial judge awarded damages to the plaintiff for this encroachment but denied injunctive relief. The Supreme Judicial Court reversed the decree on this point and directed the entry of a decree ordering the defendant to remove the encroachment and to restore the plaintiff's wall to its condition prior to the new construction.

wall; the defendant knew that the wall into which the joist or beams were intruded belonged to the plaintiff." [5] According to the Court's opinion the master also found "that she knew the plaintiff's wall belonged to the plaintiff but that she, the defendant, never claimed ownership over it, nor did she intend to deprive the plaintiff of any part of her wall at any time." [6] The Court then stated that the issue raised by the alleged inconsistency between the master's ultimate finding and his subsidiary findings was "whether claim of right and an intent to oust are necessary elements in the acquisition of rights by prescription." [7] In resolving this issue the Court took the position that acts may evidence an intent to claim as of right "and the physical facts of entry and continued possession may themselves evidence an intent to occupy and to hold as of right sufficient in law to support the acquisition of rights by prescription." [8] It was, therefore, concluded that the master's subsidiary findings were not inconsistent with the finding that the defendant had acquired a prescriptive right in the plaintiff's wall with respect to the use of the original room.

B. Legislation

§1.3. Statutes barring latent rights. Latent rights in real property are being outlawed by statute nowadays unless the rights are reaffirmed by a new record in the registry of deeds or probate. Such statutes have been enacted lately as to attachments,[1] leases,[2] mortgages,[3] rights of entry and possibilities of reverter,[4] administration of intestate estates,[5] legacies,[6] rights related to formal defects,[7] corporate tax liens,[8] and in-

[5] Record, pp. 16-17. It is surprising that the Court's opinion, in setting forth the master's findings and in its discussion of the facts, makes no mention of the finding that the defendant knew "that there was a roof resting on the plaintiff's wall." This finding was relevant on the issue whether the defendant's use was adverse.

[6] The Court misread the record on this point. The quoted language was not a part of the master's findings but was included in a summary of the evidence as the testimony of the plaintiff. In any event the defendant was bound by her own testimony as to her knowledge and intent. Fraser v. Fraser, 334 Mass. 4, 6, 133 N.E.2d 236, 238 (1956).

[7] 338 Mass. 330, 333, 155 N.E.2d 432, 434 (1959).

[8] 338 Mass. at 334, 155 N.E.2d at 435. The Court's holding is supported by 4 Restatement of Property §458, Comments *c* and *d*, and by the weight of authority. See 3 American Law of Property §15.4 (Casner ed. 1952).

§1.3. [1] Acts of 1945, c. 339, adding to, and Acts of 1953, c. 338, §2, amending G.L., c. 223, §114A.

[2] Acts of 1956, c. 305, amending G.L., c. 184, §19 (to be fully effective in 1966).

[3] Acts of 1957, c. 370, adding §§33, 34 and 35 to G.L., c. 260 (to be fully effective in 1963).

[4] Acts of 1956, c. 258, amending G.L., c. 184, §19, and inserting §31A in G.L., c. 260 (to be fully effective in 1966).

[5] Acts of 1951, c. 684, amending G.L., c. 193, §4.

[6] Acts of 1954, c. 465, §2, amending G.L., c. 197, §19.

[7] Acts of 1956, c. 348, inserting §24 in G.L., c. 184.

[8] Acts of 1954, c. 461, amending G.L., c. 63, §76.

heritance tax liens.[9] Since many title problems involve possible adverse rights that have no vitality, real estate transactions can be relieved of a considerable burden of delay and expense by barring rights that no one values enough to preserve. These statutes reflect a relatively greater than traditional regard for the marketability of real estate and a relatively smaller regard for vested property rights. Or, in another aspect, the statutes are measures to improve the machinery of free enterprise by reducing the waste of effort on the protection of interests not worth protecting. During the 1959 SURVEY year three such statutes were enacted, one as to dower and curtesy, one as to the period of limitation of actions by persons under disability, and the third as to off-record interests which are kept alive by indefinite references in recorded deeds.

Dower and Curtesy. Estates of homestead no longer serve any purpose so no one claims such estates and the law of homestead is a dead letter. The same would be true of dower and curtesy except that those rights arise willy-nilly whenever a landowner marries and whenever a married person acquires land. Therefore, for each individual owner in a chain of title the title examiner must ascertain that there is no surviving spouse who can claim dower or curtesy. This is hard to ascertain if the title records do not tell an owner's marital status or if the title records indicate successive marriages. For a real estate transaction to be burdened with the added delay and expense of investigating a former owner's marital status is most wasteful because dower and curtesy today have no social value to justify the burden.

Chapter 68 of the Acts of 1959 bars dower or curtesy claims after 1960 in land conveyed by a deed on record for ten years, unless a notice has been recorded. The deadline for recording the notice is ten years after the deed was recorded or January 1, 1961, whichever is later. This will eliminate the title examiner's problem except for the relatively recent cases; and in the recent cases the facts are likely to be easier to determine.

Dower and curtesy have been abolished in many jurisdictions but bills to abolish them in Massachusetts have failed of enactment. Objections to earlier bills were countered by a milder bill filed in 1958 which would have confined dower and curtesy to land owned by a decedent at his death. The 1958 bill passed both houses but was killed by a pocket veto. The 1959 act was the best the bar could hope to get in the current administration. If the 1958 measure should be revived and enacted later, it will dispose of the title examiner's problem altogether and will make unnecessary the attendance of persons who appear at real estate closings solely to release dower or curtesy.

Statute of limitations. The twenty-year period of limitation on actions for the recovery of land and on rights of entry[10] is subject to exceptions for persons under age, insane, imprisoned, or absent from the United States.[11] For these persons the period extends for ten years

[9] Acts of 1957, c. 502, amending G.L., c. 65, §9.
[10] G.L., c. 260, §21.
[11] Id. §25.

after the disability is removed. So the period may extend for a long lifetime plus ten years. The doctrine of adverse possession or prescription is a corollary of the statute of limitations and has the effect of freeing real estate from latent rights. Although the period of prescription is often stated as twenty years, disabilities extend the period of prescription.[12] A title examiner rarely knows the identity of the persons who may have a right of action or entry against the record owner and so he can rarely know whether these persons are free from disabilities. Consequently, the doctrine of prescription is not of much help in a title search.

Effective after 1960, Chapter 269 of the Acts of 1959 puts an outside limit of twenty-five years on the period of limitation even in cases of persons disabled throughout the period.[13] This will make it easier to pass titles which appear of record to be subject to old interests and will reduce the risk of interests created before the period covered by a title search.

Indefinite references. The most important real estate statute in recent years is Chapter 294 of the Acts of 1959, entitled "An Act to Protect Land Titles Against the Effects of Indefinite References." It deals with adverse unrecorded interests which may have force because of ill-drawn recorded instruments. Typical examples of defective language affected by the statute are the following:

(1) A grants to B land "subject to encumbrances";[14]

(2) A grants to B land "except such parts thereof as A has heretofore conveyed";

(3) A grants to B "all A's right title and interest in land in Boston";

(4) A grants land to "B as trustee."

In cases represented by examples (1), (2), and (3) the quoted language may permit X, the holder of an unrecorded instrument, to prevail against B. (The title examiner knows of no unrecorded instrument, of course, and chances are that none exists; but he has no basis for a favorable title opinion when recording gives no priority.) X would have been barred in each of those cases by language showing A's intent to bar unrecorded interests. But, lacking such language, X may prevail either on the ground that A purported to convey only his estate diminished by off-record interests[15] or, if the reference to off-record interests is explicit, on the ground that B is a person "having actual notice of it." [16]

The case represented by the fourth example is quite different. In that case there is no problem of unrecorded interests which may have arisen before A's deed to B as trustee, but whoever thereafter acquires an interest under B may hold such interest subject to the trust. Lacking

[12] 2 Restatement of Property §221.

[13] As to particular rights due to the lack of a seal, acknowledgment certificate, certificate of corporate vote, etc., in certain circumstances the period of limitations had been reduced to ten years by the Acts of 1956, c. 348. See note 7 *supra*.

[14] The Land Court equity business in recent years has been largely bills for reformation of deeds of this sort.

[15] Leominster Gas Light Co. v. Hillery, 197 Mass. 267, 83 N.E. 870 (1908).

[16] G.L., c. 183, §4.

identification of a trust instrument defining B's obligations and powers, the title examiner cannot know whether a later conveyance by B is effective to extinguish the rights of the beneficiary in the land. Unless the later conveyance is made under a power to convey free of trust, the beneficiary may follow the res into the hands of anyone who takes it with notice of a trust. The words "as trustee" in the deed are enough to give notice to a successor in title. Commonly, when there is a deed to a person "as trustee" without further specification, there is no trust instrument and so there is no valid trust of real estate;[17] but the fact that there is no written instrument cannot be established of record without judicial proceedings.

The statutory remedy took effect August 9, 1959. Persons who on that date held interests affected by the statute must by August 9, 1960, record instruments prescribed by the statute to establish their interests on the records. Under the statute, an instrument recorded outside the chain of title (i.e., A's instrument recorded before the recording of the conveyance to A or after the recording of A's conveyance to B) is treated as unrecorded.

The vice of the quoted language in the examples given above is that unrecorded instruments affecting the land in question are thereby exempted from the effect of the recording act. The statute basically says that this language shall not have that effect. But the statute has to say more in order to avoid some unintended side effects. For one thing, the practice of recording simultaneously instruments of which one is to have priority over another is justified by the recital in one instrument that it is subject to another instrument "recorded herewith." To permit this practice to continue, the statute leaves immediate parties to an instrument unaffected by the statute. The statute also excludes from its operation the statutory notice of lease and the reference in a mortgage to the instrument creating the obligation secured.

The statute seems to accomplish its purpose of maintaining the policy of the recording act as against an unrecorded interest that may have survived the recording of a later instrument because of imperfect language in the recorded instrument. The statute does not affect interests that need not be recorded anyhow, such as title or easements acquired by prescription and leases for seven years or less. The statute does not affect registered land.

§1.4. **Tidelands.** The Legislative Research Council on January 26, 1959, submitted House Document No. 2627 relative to state licensing and control of the use of tidelands. The subject had for many years attracted little interest. Owners of tideland filled their land and built structures upon it under licenses revocable by the Commonwealth, relying upon the fact that the Commonwealth had never revoked such licenses. They found mortgagees and buyers willing to rely on that fact also. But in connection with the construction of the Central Artery above land of the Boston & Maine Railroad at the North Station

[17] Id., c. 203, §1.

in Boston, the Commonwealth revoked such licenses and the railroad's right to damages for land taking was substantially impaired. Consequently, landowners, mortgagees and buyers have become quite unwilling to assume that such licenses will not be revoked. The General Court has passed special acts to render certain licenses irrevocable and there have been bills filed to accomplish the same result generally. These bills were the provocation for the report of the Legislative Research Council which has greatly illuminated the subject whatever may be the fate of the proposals for general legislation.

§1.5. **Foreclosure proceedings.** Chapter 105 of the Acts of 1959 meets an objection to the judicial proceedings brought by mortgagees in order to comply with the Soldiers and Sailors Civil Relief Act of 1940 as amended. Although the only occasion for judicial proceedings was the Civil Relief Act, in suits brought pursuant to the Massachusetts procedural statute enacted for the purpose,[1] the mortgagee was subject to all defenses of any respondent which were permissible in any equity proceeding.[2] In consequence, debtors not in military service have taken advantage of the judicial proceedings to stall foreclosure. Chapter 105 puts an end to this practice. Of course, the debtor may still bring suit for the same purpose but the initiative required is so much greater than that required for filing an appearance that the act will accomplish its purpose.

§1.6. **Protection of developers against zoning changes.** Chapter 221 of the Acts of 1959, amending G.L., c. 40A, §7A, protects a developer of residential real estate against zoning changes after he has filed a preliminary plan with the planning board, if he meets the several requirements of that chapter.[1]

§1.7. **Turnarounds in residential developments.** Chapter 410 of the Acts of 1959 is intended to minimize the problem of a residential real estate developer who has sold lots according to a plan showing a dead-end street with a turnaround and who thereafter, to meet planning board requirements for extension of the development, must eliminate the turnaround and extend his street. The new statute states that easements arising after 1959 in a turnaround shall terminate when the street extension has been built as shown on a recorded, approved plan and as evidenced by a recorded certificate of the planning board. The owners of lots abutting the turnaround, however, retain their easements. This statute is meant to save the developer the trouble of getting releases from all lot owners who may have implied easements in the turnaround. It seems to accomplish its purpose. Conveyancers may hope, however, that this type of statute does not become common for it has the effect of limiting the duration of easements which, according to the instruments creating them, are unlimited in duration. Such

§1.5. [1] Acts of 1943, c. 57.
[2] Lynn Institution for Savings v. Taff, 314 Mass. 380, 50 N.E.2d 203 (1943).

§1.6. [1] For a discussion of this act, see §12.10 *infra*.

a statute passed in 1887 as to restrictions and conditions[1] is of wide application and is well known to the bar. But such statutes of limited application are likely to be traps for the unwary.

C. PERSONAL PROPERTY

§1.8. Gift of joint interest in savings account. The joint savings account has become a popular device to transmit funds on deposit in a bank on the death of the original depositor to the named "co-owner" without the necessity of a will or the expense and inconvenience of administration of the estate. The courts in Massachusetts, as well as elsewhere,[1] have had considerable difficulty in constructing a legal theory adequate to accomplish the socially desirable result of effectuating the intent of the donor without, at the same time, dispensing with the traditional formal requirements for a valid gift of personal property.

In the first case in which the Supreme Judicial Court was called upon to analyze the transaction, *Chippendale v. North Adams Savings Bank*,[2] the survivor was held entitled to take, not on the theory of a gift but on the ground that the addition of the name of the claimant to the deposit book effectuated a novation whereby the bank contracted to pay either named person. The novation-contract theory was used to uphold the transaction, rather than the gift theory, in order to avoid invalidating the transaction because of lack of delivery of the pass book to the claimant.[3] The contract theory continued to play a large part in subsequent cases involving joint accounts,[4] but was eventually displaced by the rationale of a gift of an interest in joint tenancy in the account. The crucial question of fact then became whether the original depositor intended, by adding the name of a purported co-owner to the account, to effect a gift of a present interest in joint tenancy in the account.[5] The contract between the bank and the named co-owners performed only the function of serving as a substitute for the delivery

§1.7. [1] G.L., c. 184, §23, limiting conditions or restrictions to thirty years.

§1.8. [1] See Kepner, Five More Years of the Joint Bank Account Muddle, 26 U. Chi. L. Rev. 376 (1959); Kepner, The Joint and Survivorship Bank Account — A Concept Without a Name, 41 Calif. L. Rev. 596 (1953).

[2] 222 Mass. 499, 111 N.E. 371 (1916).

[3] In Noyes v. Institution for Savings in Newburyport, 164 Mass. 583, 42 N.E. 103 (1895), lack of delivery of the book to the donee-survivor was assigned as one of the reasons for denying recovery to the survivor.

[4] See, e.g., Holyoke National Bank v. Bailey, 273 Mass. 551, 174 N.E. 230 (1931); Kentfield v. Shelburne Falls Savings Bank, 273 Mass. 548, 174 N.E. 229 (1931); Perry v. Leveroni, 252 Mass. 390, 147 N.E. 826 (1925).

[5] Armstrong v. O'Brien, 329 Mass. 572, 109 N.E.2d 647 (1952); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); Battles v. Millbury Savings Bank, 250 Mass. 180, 145 N.E. 55 (1924). In Drain v. Brookline Savings Bank, 327 Mass. 435, 99 N.E.2d 160 (1951), the often cited case of Chippendale v. North Adams Savings Bank, 222 Mass. 499, 111 N.E. 371 (1916), was repudiated to the extent that it held that the contract with the bank determined the rights of the parties irrespective of the in-

normally required for a valid gift.[6] The contract theory has, despite its original contribution, added considerable confusion to the law of joint accounts and it may be asked whether it would not be wiser to abandon it entirely and to rely upon the joint form of the account as a substitute for the formal requirement of delivery of the subject matter of the gift.

In the recent case of *Gaucher v. Planeta*[7] the novation-contract concept was again invoked as establishing the rights of the survivor-claimant of the account against the bank, but not as determinative of the rights of the executor of the original depositor against the survivor. The case is unusual in that the survivor was denied the right to the balance of the account on the ground that the original depositor "did not understand the legal significance of the bank book transaction, whereby [the claimant's] name was put on the book." [8] The fact that the decedent was an elderly man who was unable to write English and understood it imperfectly, and that the claimant was not related to the decedent, presented a case with a strong possibility, but no direct evidence, of overreaching. Because of the paucity of evidence as to the intention of the decedent when he caused the name of the survivor to be added to the bank book, the case might well have been resolved on the issue of burden of proof. Although there is apparently no express authority on the point, it would seem that the executor has the burden of disproving any donative intent on the part of the decedent.[9]

In evaluating the evidence as to the decedent's intention, the Court stated that the retention of the bank book by the decedent "tends to negative any intent to give it to Planeta [the surviving joint depositor] as property. . . ." [10] This statement is surprising in view of the ample authority that no delivery of the book is necessary to effectuate a gift of a joint interest in the account.[11] As a practical matter the donor usually retains possession of the bank book in the joint account situation. And the suggestion that the retention of the pass book by the donor tends to rebut the existence of donative intent may have the unfortunate effect of encouraging a revival of litigation in an area that too often has been a battleground between the legal representative of the original depositor and the donee-survivor.

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tention of the original depositor to make a gift of a joint interest in the account to the person whose name was added to the book.

[6] Ball v. Forbes, 314 Mass. 200, 49 N.E.2d 898 (1943); Goldston v. Randolph, 293 Mass. 253, 199 N.E. 896 (1936).

[7] 338 Mass. 121, 153 N.E.2d 895 (1958).

[8] 338 Mass. at 124, 153 N.E.2d at 898.

[9] "The transactions under which the joint accounts were created are to be taken at their face value unless the evidence shows that they were not so intended." Armstrong v. O'Brien, 329 Mass. 572, 575, 109 N.E.2d 647, 648 (1952). See also Drain v. Brookline Savings Bank, 327 Mass. 435, 441, 99 N.E.2d 160, 164 (1951).

[10] 338 Mass. 121, 125, 153 N.E.2d 895, 898 (1958).

[11] Kittredge v. Manning, 317 Mass. 689, 59 N.E.2d 261 (1945); Ball v. Forbes, 314 Mass. 200, 49 N.E.2d 898 (1943); Goldston v. Randolph, 293 Mass. 253, 199 N.E.2d 896 (1936).

§1.9. Gifts conditional on marriage. The right of a donor to recover a gift made in contemplation of marriage with the donee when the agreed marriage fails to take place has been presented to the courts only infrequently. In this area strong social customs, rather than rules of law, have usually governed the conduct of the parties to the contract to marry.[1] In a case of first impression in Massachusetts, *De Cicco v. Barker*,[2] the Supreme Judicial Court was called upon to determine the right of a donor to recover from his former fiancée a six-carat diamond engagement ring when the donee broke the engagement without adequate cause or fault on the part of the plaintiff. In allowing recovery the Court held that the engagement ring was given on the implied condition of marriage and since the donee was unwilling to fulfill the condition the donor was on equitable principles entitled to restitution.[3] The so-called Heart Balm Act,[4] abolishing causes of action for breach of promise to marry, was held not to bar the action.[5]

Whether the condition of marriage attached to the gift is deemed by the Court to be one of fact, inferred from the circumstances, or one of law, imposed to prevent injustice, is none too clear.[6] Under either theory it is probable that no recovery of the engagement ring would be allowed if the breach of the engagement were owing to the fault of the donor. But if the engagement were terminated by mutual consent or by the death of one of the parties, it would seem that recovery of the engagement ring would be permitted because of the symbolic relationship of the ring to the marriage.[7]

§1.9. [1] Pronouncements made by the arbiters of etiquette perhaps carry more weight than judicial decrees in influencing the conduct of engaged ladies who have exercised their prerogative to change their minds.

[2] 1959 Mass. Adv. Sh. 1075, 159 N.E.2d 534.

[3] The Court relied heavily upon the Restatement of Restitution §58.

[4] G.L., c. 207, §47A.

[5] The majority of states having similar legislation have reached the same conclusion. See, e.g., Gikes v. Nicholis, 96 N.H. 177, 71 A.2d 785, 24 A.L.R.2d 576 (1950). *Contra:* Josephson v. Dry Dock Savings Institution, 266 App. Div. 992, 45 N.Y.S.2d 120 (1st Dept. 1943), *aff'd without opinion*, 292 N.Y. 666, 56 N.E.2d 96 (1944). In holding that the Heart Balm Act did not prevent recovery the Court had to retract some of the sweeping statements made in Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349, 158 A.L.R. 613 (1945).

[6] The plaintiff had given a total of four rings to the defendant. The master found that the six-carat diamond ring had been given "as an engagement ring . . . on the implied condition that the parties would be married" but that the other rings constituted absolute gifts. Although the plaintiff's bill sought recovery of all the rings, the decree ordered the defendant to return only the engagement ring.

[7] See Restatement of Restitution §58. The few cases dealing with the donor's right to recovery when the marriage had been prevented by death appear to be in conflict. See Annotation, 24 A.L.R.2d 598 (1952).