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CHAPTER 8

Security and Mortgages

JOHN D. O'REILLY, JR.

A. SECURITY

§8.1. Subrogation by subcontractor on public contract. As a general rule, the statutory provisions extending to laborers and materialmen liens upon the real estate upon which they furnish labor or materials¹ do not extend to those who furnish labor and material upon public buildings or works.² In lieu of liens, those who furnish labor and material upon public works are given, as security for payment, recourse to payment bonds or other collateral, such as retained percentages of the contract price, in the hands of the contracting public agency.³ But the furnisher of labor or material, in order to avail himself of such security, must follow the statutory procedure. Failure to do so is fatal.⁴

The statutory pattern includes filing, by a claimant, within ninety days⁵ "after the claimant ceases to perform labor or furnish labor, materials, appliances and equipment," a sworn statement of claim with an appropriate public officer or official.

In *Smith Co. v. Frankini Construction Co.*⁶ the Court had occasion to construe this requirement in a unique setting. Frankini contracted with the Medford Housing Authority for construction of a public housing project. It entered into various subcontracts including one with Anchor Post Products, Inc., under which Anchor, for an agreed

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¹ §8.1. 1 G.L., c. 254, §§1-4.

² Id. §6. As to the immunity of property of housing authorities from mechanics' liens, see G.L., c. 121, §26V.

³ As to contracts with the Commonwealth, see G.L., c. 30, §39. As to contracts with political subdivisions of the Commonwealth, see G.L., c. 149, §29.

⁴ *Philip Carey Manufacturing Co. v. Peerless Casualty Co.*, 330 Mass. 319, 113 N.E.2d 226 (1953).

⁵ This is the present provision. See Acts of 1955, c. 702, §1, 3, amending G.L., c. 30, §39, and c. 149, §29, respectively. Prior to the 1955 amendments, both statutes provided for filing within sixty days.

⁶ 1956 Mass. Adv. Sh. 891, 135 N.E.2d 924.

price of \$7500, was to furnish and install chain link fencing and clothes posts as specified in the general contract. By the terms of the subcontract, Anchor was to receive monthly progress payments within ten days after Frankini had received such payments from the Authority. By December 8, 1953, Anchor had "substantially completed" its subcontract, and there remained but \$156 worth of labor and material to finish the work. Anchor, however, had received from Frankini only \$3,000, although the Authority had made progress payments of over \$6500 to Frankini on account of Anchor's performance. Anchor thereupon notified Frankini that it would not complete work under the subcontract unless paid the balance then due. Anchor, in fact, did no more work under the subcontract.

In July, 1954, the Authority declared Frankini to be in default on the general contract, and subsequently it rightfully terminated the general contract as of August 11, 1954. On October 4, 1954, Anchor filed with the city clerk of Medford⁷ its sworn statement of claim, and subsequently brought suit against the Authority and the surety on the general contractor's payment bond.

Although Anchor's statement, filed on October 4, 1954, was filed manifestly more than sixty days after December 8, 1953, the last day on which Anchor did anything in performance of its subcontract, the Court held the filing to be timely. Anchor was not limited under general contract law, reasoned the Court, to the alternatives of (1) terminating the subcontract on December 8, 1953, for Frankini's default and suing in quantum meruit, or (2) completing performance of the subcontract and demanding full payment, in either of which cases it would have been entitled to reach the security. It could, as against Frankini, treat the subcontract as still subsisting but withhold further performance until Frankini should cease to be in default. "The course pursued by [Anchor] in withholding further performance until it was paid was a permissible one under the law of contracts and the price of its exercise ought not to be the loss of the security."⁸

While the time of filing was not literally within the period prescribed by the statute, the Court felt that the "spirit and intentment"⁹ of the statute were satisfied. Since the subcontractor had no right to resume and complete performance after the termination of the general contract, that date may be taken to be the time when the subcontractor ceased to furnish labor and materials.¹⁰ Thus once more the Court has demonstrated its ability to accommodate the letter of a statute to its beneficent purpose.

⁷ This was, apparently, the appropriate officer with whom to file the statement of claim at the time. See G.L., c. 149, §29 as it stood prior to being amended by Acts of 1955, c. 702, §3. Under the amendment, statements of claim under contracts with political subdivisions other than counties, cities, and towns are to be filed with "the contracting officer or agent." Cf. *Belanger & Sons, Inc. v. Concannon Corp.*, 333 Mass. 22, 127 N.E.2d 670 (1955).

⁸ *Smith Co. v. Frankini Construction Co.*, 1956 Mass. Adv. Sh. 891, 896, 135 N.E.2d 924, 927.

⁹ 1956 Mass. Adv. Sh. at 895, 135 N.E.2d at 927.

¹⁰ 1956 Mass. Adv. Sh. at 896, 135 N.E.2d at 927.

§8.2. Priority by subrogation. An interesting application of, or rather refusal to apply, the doctrine that one who advances money to pay off a first mortgage may be entitled to priority over a junior encumbrancer of whom he was unaware was made in *Morad v. Silva*.¹

In that case, in September, 1949, Morad took a mortgage of Rebecca Silva's land to secure performance of a contract by her husband. The mortgage was not recorded until December, 1949. Meanwhile, in October, 1949, Morad advanced money, the loan being secured by another mortgage of the same land. This mortgage was recorded in October, 1949. A year later, in October, 1950, Silva obtained a mortgage loan from a bank, and the proceeds of the loan, plus some additional cash, were used to obtain a discharge of the money mortgage held by Morad. The bank, whose title examiner had failed to discover the record of the other mortgage held by Morad, assumed that it was receiving a first mortgage. When the bank loan was made, Morad accompanied the Silvas to the bank, waited for them in the lobby while they were closeted with a bank official in an inner room, and accepted the bank's check to Silva plus cash in return for his discharge of the money mortgage. The bank did not discover the existence of the other mortgage until Morad brought suit for authority to foreclose it² in accordance with the Soldiers' and Sailors' Civil Relief Act.³ The bank was made a party to this suit, and asserted priority of its mortgage over Morad's.

The Supreme Judicial Court rejected the bank's contention, ruling that the case was distinguishable from *Worcester North Savings Institution v. Farwell*.⁴ In that case, the property was subject to three recorded mortgages. The third mortgage recited that it was subject to the first, but the third mortgagee, at the time of taking his mortgage, was unaware of the second mortgage, although it was duly recorded. The mortgagor, deciding to refinance, obtained a mortgage loan from the bank. The proceeds of the loan were used to obtain discharges of the first and second mortgages, a mortgage was given to the bank, and a new mortgage was given to the prior second mortgagee. The bank had failed to discover the record of the third mortgage, which thus became a first mortgage on the record. In a suit by the bank to have its mortgage given priority, a decree was ordered for the plaintiff on the ground that the original first mortgage had been discharged by mistake, and the bank was entitled to be subrogated to the position of the holder of that mortgage.

In *Morad*, the *Farwell* case was distinguished in that there "the third mortgagee ultimately was no worse off than he had been before. . . . That is not the situation before us. The plaintiff here was always the holder of a valid first mortgage on the locus which had been duly recorded."⁵ This point may be debatable, since the money

§8.2. ¹ 1956 Mass. Adv. Sh. 437, 133 N.E.2d 478.

² See Acts of 1943, c. 57, as amended by Acts of 1945, c. 120.

³ 50 U.S.C. App. §532 (1946).

⁴ 292 Mass. 563, 198 N.E. 897 (1935).

⁵ 1956 Mass. Adv. Sh. 437, 440, 133 N.E.2d 478, 480.

mortgage which was discharged with the bank's loan and to which the bank sought to be subrogated was prior in record, though not in time, to Morad's other mortgage. A better distinction might have been that subrogation was allowed in *Farwell* to avoid unjust enrichment of the third mortgagee by giving him an undeserved windfall to the prejudice of the reasonable expectations of the bank, whereas, in the circumstances of Morad's case, allowing him to maintain the priority over the new bank mortgage which was his under the recording act would not "shock the conscience of the Chancellor" or be regarded as unjust enrichment.⁶

B. MORTGAGES

§8.3. **Accounting by mortgagee in possession.** Under the statutes, a mortgagee who has been in possession of the land must account to a redeeming mortgagor for rents and profits after deducting amounts expended for repairs, improvements, taxes, assessments, and "all other necessary expenses in the care and management of the land."¹ Likewise, a mortgagee foreclosing under a power of sale is entitled to retain, out of the proceeds of the sale, all sums secured by the mortgage, "including all costs, charges or expenses incurred or sustained by him . . . by reason of any default in the performance or observance of the condition of the mortgage . . ."² During the 1956 SURVEY year there were several determinations as to items which did, or did not, constitute such "expenses."

In *State Realty Co. v. MacNeil Bros. Co.*³ a flat departure from the established law of this⁴ as well as a majority of other jurisdictions⁵ took place when the Court allowed a mortgagee in possession to credit itself with amounts paid for liability insurance premiums. The contrary rule, disallowing credit for insurance premiums, has not, it is believed, been generally followed in practice, and the Court has been less than zealous in enforcing it. Thus, where it did not affirmatively appear that the parties had not contracted themselves out of the

⁶ Use of this approach in the *Farwell* case might have led to a different result as to the second mortgagee. The report is not clear as to whether, when he discharged his mortgage, he had actual knowledge of the third mortgage (in which case, of course, he would clearly not be entitled to relief) or had made any effort to ascertain what his relative rights would be upon taking a new mortgage. If he had not, his claim to the equitable relief of subrogation should be less strong than that of the bank, which had caused a title examination, albeit an imperfect one, to be made for its protection before lending.

§8.3. ¹ G.L., c. 244, §20.

² G.L., c. 183, §27.

³ 1956 Mass. Adv. Sh. 819, 135 N.E.2d 291. *Accord:* *MacNeil Bros. Co. v. Cambridge Savings Bank*, 1956 Mass. Adv. Sh. 869, 135 N.E.2d 652.

⁴ *Saunders v. Frost*, 5 Pick. 259 (Mass. 1827); *Boston & Worcester Railroad Corp. v. Haven*, 8 Allen 359 (Mass. 1864).

⁵ See *Amer. Law Prop.*, 4 *American Law of Property* §16.103 (1952).

rule, the mortgagee was allowed credit for premiums paid by him.⁶ And on one occasion a general finding for the mortgagee for a number of items of account was held to imply a finding by the trial judge that fire insurance was "reasonably necessary for the preservation of the mortgaged property . . ." ⁷ From the citations in the opinion, it may be inferred that the Court is prepared to adopt the standard which has been suggested extrajudicially⁸ that a mortgagee should receive credit for purchases of insurance of any kind which a reasonable man, in charge of his own property, would take out.⁹

Massachusetts, unlike most other jurisdictions,¹⁰ allows a mortgagee in possession compensation for "management services." The usual measure of this compensation is 5 percent of the rents collected, but this is not an invariable formula. In *MacNeil Bros. Co. v. Cambridge Savings Bank*,¹¹ the Court pointed out that the standard is fair compensation for services, so that an allowance of 6 percent of rents collected is not erroneous as a matter of law. This has long been the law of the Commonwealth, as is shown by the citations in the opinion.

A fine distinction has been developed as to which expenses incurred by a mortgagee for legal services are chargeable to the mortgagor. It seems clear that legal expenses incident to foreclosure are so chargeable.¹² But the status of other expenditures for legal services is not so definite. In *State Realty*, after the mortgagee took possession, the mortgagor brought a number of lawsuits to prevent the collection of rents by the mortgagee. It was held that the cost of defending these suits is a necessary expense of care and management. However, where the mortgagee in possession retained counsel when it was made defendant in a suit by the mortgagor for redemption, the Court in the *Cambridge Savings* case disallowed credit for the attorney's fee paid. It found applicable the general rule that taxable costs, although plainly inadequate, are the sole compensation allowable to a successful party for the expense of conducting litigation.

§8.4. Accounting by foreclosing mortgagee. In *Anderson, Inc. v. McManus*¹ a mortgagee, who was also an auctioneer, conducted a foreclosure sale and acted as his own auctioneer. It is well established that the commission of an auctioneer at a foreclosure sale is an expense of the mortgagee chargeable to the mortgagor.² In the *Anderson* case, however, the Court disallowed the commission, citing *Bent v.*

⁶ *Altobelli v. Montesi*, 300 Mass. 396, 15 N.E.2d 463 (1938); *Donohue v. Chase*, 139 Mass. 407, 2 N.E. 84 (1885).

⁷ *City Institution for Savings v. Kelil*, 262 Mass. 302, 308, 159 N.E. 731, 734 (1928).

⁸ Glenn, *Mortgages* §213 (1943).

⁹ *State Realty Co. v. MacNeil Bros. Co.*, 1956 Mass. Adv. Sh. 819, 828, 135 N.E.2d 291, 298.

¹⁰ 4 American Law of Property, §16.102 (1952).

¹¹ 1956 Mass. Adv. Sh. 869, 135 N.E.2d 652.

¹² *Davis v. Continental Realty Co.*, 320 Mass. 428, 69 N.E.2d 671 (1946), and cases cited.

§8.4. ¹ 1956 Mass. Adv. Sh. 911, 135 N.E.2d 302.

² *City Institution for Savings v. Kelil*, 262 Mass. 302, 159 N.E. 731 (1928).

Cobb.³ The latter case seems hardly in point. The only issue there was whether the guardian of an infant, who auctioned off the infant's realty under court license, had authority to bind the successful bidder at the auction by executing a memorandum to satisfy the Statute of Frauds. On familiar principles of agency, it was held that he could not. The *Anderson* case was not concerned with the authority of the mortgagee-auctioneer as agent. It seems indistinguishable, in principle, from a case where a mortgagee, who is also an attorney, performs for himself the legal services incident to foreclosure. In such case he is entitled to credit for the fair value of these services.⁴ In both cases, it seems that the question should be how much of the value of foreclosure proceedings should be charged to the mortgagor.

The method of computing accounts was set forth by Chief Justice Shaw in his classic opinion in *Van Vronker v. Eastman*.⁵ The essence of the method is the striking of a balance of the indebtedness *annually*, by deducting the net rent for the year from the total of the outstanding principal and the year's interest. Despite the anciencey of the formula, the Court in *MacNeil Bros. Co. v. Cambridge Savings Bank*⁶ was required to remind a mortgagee that it could not compute interest for more than a year after default and entry upon the amount of principal due at the time of entry without crediting against that amount the sum of the net rents collected annually.

§8.5. **Subsequent advances by mortgagee.** Since 1946¹ a mortgagee who, subsequent to the recording of his mortgage, makes loans to the mortgagor for the purpose of paying for repairs or replacements, or for taxes or other municipal liens, charges, or assessments on the mortgaged premises, has the security of the original mortgage for the new loan and preserves priority over junior encumbrancers up to the amount originally secured by the mortgage. With respect to new loans for these limited purposes, the 1946 provisions make it possible to avoid some of the troublesome technicalities which the common law attached to the question of priorities between encumbrancers.² During the 1956 SURVEY year the legislature further liberalized the law by extending the same security right and priority to mortgagees who make subsequent loans to mortgagors for payment for improvements to the mortgaged premises.³ The priority of the mortgagee as to subsequent loans for improvements runs only against junior encumbrancers whose encumbrances were not recorded prior to September 1, 1956.

§8.6. **Recording of chattel mortgages.** During the 1956 SURVEY year Judge Wyzanski, in the United States District Court, gave a

¹ 9 Gray 397 (Mass. 1857).

⁴ *Kacouris v. Loukas*, 333 Mass. 44, 127 N.E.2d 783 (1955).

⁵ 7 Metc. 157 (Mass. 1843).

⁶ 1956 Mass. Adv. Sh. 869, 135 N.E.2d 652.

§8.5. 1 G.L., c. 183, §28A, inserted by Acts of 1946, c. 438, §1.

² See Osborne, *Mortgages* §§113-124 (1951).

³ Acts of 1956, c. 92.

novel interpretation to the Chattel Mortgage Recording Act.¹ In *In re Plaza Co.*,² a chattel mortgage, containing a recital that it was signed "this . . . day of February, 1954" was recorded on February 17, 1954. In a proceeding by a trustee in bankruptcy to challenge the validity of the mortgage, the referee admitted parol evidence that the actual date of execution and delivery of the mortgage was February 15, 1954, and concluded that the instrument had been recorded within the fifteen days prescribed by the statute. This conclusion of the referee was sustained by the court.

It is difficult to share the District Court's assurance³ that the state court would reach the same result. The history of the recording statute, and the terminology of at least one similar statute^{3a} elsewhere, make this doubtful.

An earlier version of the statute⁴ provided for recording of a chattel mortgage "within fifteen days after the date thereof." In *Shaughnessy v. Lewis*⁵ it was held that this statute was satisfied by recording within fifteen days of the date of actual delivery, even though the mortgage contained a recital of its execution on a much earlier date. In 1883, however, the statute was amended to substantially its present form, requiring recordation "within fifteen days from the date written in such mortgage, . . ." ⁶ This amendment has been said to be "presumably in consequence of this [*Shaughnessy v. Lewis*] decision . . ." ⁷

The amended statute came before the Court in *Amerige v. Hussey*,⁸ a case involving a postdated mortgage which had been recorded on the day of its delivery. Construing the statute to require recording not later than the date written in the mortgage, the Court concluded that the recording had not been premature, and was valid. In the course of the opinion, after describing the older law as laid down in *Shaughnessy v. Lewis*, and construing the new statute, the Court went on to say: "The statute may work hardships when a mortgage is antedated by mistake, but that follows necessarily from carrying out the purpose of the statute, that the written date shall not be controlled by oral evidence." ⁹

This technique of literal reading of the recording act has been used in other applications of the statute. Thus, a purchaser from the mortgagor will prevail over the mortgagee, even though he took with

§8.6. ¹ G.L., c. 255, §1: "Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded. . . . The mortgage shall not be valid against a person other than the parties thereto until so recorded; and a record made subsequently to the time limited shall be void."

² 142 F. Supp. 734 (D. Mass. 1956).

³ 142 F. Supp. at 736.

^{3a} Me. Rev. Stat., c. 178, §1.

⁴ Acts of 1874, c. 111, §1; Pub. St., c. 192, §1.

⁵ 130 Mass. 355 (1881).

⁶ Acts of 1883, c. 73; Rev. Laws, c. 198, §1.

⁷ *Old Colony Trust Co. v. Medfield & Medway Street Ry. Co.*, 215 Mass. 156, 159, 102 N.E. 484, 485 (1913).

⁸ 151 Mass. 300, 24 N.E. 46 (1890).

⁹ 151 Mass. at 302, 24 N.E. at 46.

knowledge of the mortgage, if the mortgage was unrecorded.¹⁰ An attachment, subsequent to the giving of the mortgage, but prior to its recording, is effective.¹¹ Actual delivery of goods to a purchaser under an unrecorded bill of sale intended for security will not give priority over an attaching creditor.¹²

The cases cited in the opinion in the *Plaza* case do not support the District Court's proposition that recording within fifteen days of execution and delivery of a mortgage is effective. *Old Colony Trust Co. v. Medfield & Medway Street Ry. Co.*¹³ involved a mortgage in which two dates were written, one more than fifteen days prior to recordation, and the other within fifteen days of the recordation. The Court concluded that the latter date controlled the period of recordability, since the earlier date was simply the date as of which mortgage bonds were to be issued. The other case, *Federal Trust Co. v. Bristol County Street Ry. Co.*,¹⁴ did not involve an issue of effective recording, but was concerned with the question whether property acquired after the date recited in the mortgage passed under it. On this issue, of course, the date of delivery of the mortgage is the significant date.

In the *Plaza* case, the District Court did not consider the alternative construction of the statute that a mortgage which is inadequately dated¹⁵ is not recordable. The Maine legislature, enacting a statute similar to that of Massachusetts, requiring recording within twenty days from "the date written in the mortgage," saw fit to cover, expressly, the case of the undated mortgage by providing for recording within twenty days from the date of execution and delivery.¹⁶ It is arguable that, in the absence of such express provision, literal reading of the statute would make undated mortgages unrecordable.

¹⁰ *Travis v. Bishop*, 13 Metc. 304 (Mass. 1847).

¹¹ *Drew v. Streeter*, 137 Mass. 460 (1884).

¹² *Leahy v. George*, 273 Mass. 130, 173 N.E. 421 (1930).

¹³ 215 Mass. 156, 102 N.E. 484 (1913).

¹⁴ 222 Mass. 35, 109 N.E. 880 (1915).

¹⁵ There may be a difference between an undated and an inadequately dated instrument. Thus, in *In re Jennings*, 284 Fed. 729 (D. Mass. 1922), there was a chattel mortgage dated "July, 1920" recorded July 12, 1920. Judge Brewster ruled that enough appeared on the face of the instrument to show that it had been timely recorded. This was an alternative ground of decision. The District Court also said that it was proper for the referee to look to the note secured by the mortgage to find that the mortgage was executed on July 12, 1920. This ground of decision, of course, goes far to support Judge Wyzanski's ruling in the *Plaza* case.

¹⁶ Me. Rev. Stat., c. 178, §1.