CHAPTER 16

Property and Conveyancing

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§16.1. Recording: Chain of Title: Deeds Out from a Common Grantor. If a grantor conveys part of his land and in this "deed out" imposes restrictions on the land he retains, will a subsequent purchaser of all or part of the retained land who does not have actual notice of the restriction take the land free and clear of such burden? Is the "deed out" in the chain of title of the subsequent purchaser, so that he is deemed to have constructive notice of the restriction or may he safely ignore it? This issue, which is crucial in any land development scheme, was presented to the Supreme Judicial Court in *Guillette v. Daly Dry Wall, Inc.*[1]

In *Guillette,* one Gilmore owned a subdivision of land and conveyed a lot in the subdivision to the Guillettes.[2] The deed to the Guillettes was recorded.[3] This recorded deed referred to a recorded plan of the subdivision,[4] and contained restrictions "imposed solely for the benefit of the other lots shown on said plan."[5] It also provided that "the same restrictions are hereby imposed on each said lots now owned by the seller."[6] A later deed from Gilmore to Daly Dry Wall, Inc. of another lot in the same subdivision referred to the same plan but not to the restrictions.[7] Daly did not have actual knowledge of the restrictions and the recorded plan did not mention the restrictions.[8]

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§16.1. [1] 1975 Mass. Adv. Sh. 960, 325 N.E.2d 572.
[2] *Id.* at 961, 325 N.E.2d at 573.
[3] *Id.* at 964-65, 325 N.E.2d at 575.
[4] *Id.* at 961-62, 966, 325 N.E.2d at 573, 575.
[5] *Id.* at 962 n.2, 325 N.E.2d at 574 n.2.
[6] *Id.* (emphasis omitted).
[7] *Id.* at 962, 325 N.E.2d at 574.
[8] *Id.* at 962, 964 & n.3, 325 N.E.2d at 573, 574 & n.3. The Guillettes' deed guaranteed that only single family dwellings would be built within the subdivision. Daly sought to erect an apartment building. *Id.* at 962, 325 N.E.2d at 574.

The Gilmores, together with two other couples who owned similar lots, brought suit in the superior court to enjoin Daly from violating the restrictions.[9] Daly contended that it was not bound by the restrictions because they were not contained in a deed in its chain of title, arguing that "[f]or the courts to hold that the owner of land is chargeable with notice of any restriction put in a deed by a common grantor would, in effect, put every title examiner to the almost impossible task of searching carefully each and every deed which a grantor deeds out of a common subdivision."[10] The superior court enjoined Daly from violating the restriction.[11] Daly appealed, and the case was transferred from the Appeals Court to the Supreme Judicial Court.[12] The Court affirmed the decree enforcing the restrictions.[13]

In its brief,[14] Daly relied upon *Roak v. Davis*[15] as authority for its claim that a subsequent purchaser could not be bound by a restriction contained in a "deed out." In *Roak*, however, the Court had explicitly left the issue unresolved by concluding that, on the facts, there was no "general scheme" of restrictions.[16] The existence of such a scheme is a prerequisite to the enforcement of a restriction obtained by an earlier purchaser from a common grantor against a later one.[17] This avenue of escape was not available to the Court in the *Guillette* case because it had determined that there was such a common scheme.[18]

There is limited, if any, utility in approaching the problem from a conceptual perspective. Very little light is shed on the situation by characterizing the "titles" of the prior and subsequent purchasers as being distinct. The real question is whether deeds to other tracts give sufficient notice to allow a subsequent purchaser to protect himself by a title search. Because the conveyancing histories of the parcels can be traced to the common grantor, it is clearly possible to learn of any recorded restriction by a search of all other deeds to parcels within the subdivision that he has granted. In that sense, the parcels are "distinct" only because of their separate conveyancing histories.[19]

It is also not particularly satisfying to contend that the deed to the dominant estate has the primary purpose of conveying title to it, and

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[9] *Id.* at 961, 325 N.E.2d at 573.

[10] Brief for Respondent at 8-9, Guillette v. Daly Dry Wall, Inc., 1975 Mass. Adv. Sh. 960, 325 N.E.2d 572 [hereinafter cited as Brief for Respondent].

[11] 1975 Mass. Adv. Sh. at 961, 325 N.E.2d at 573.

[12] *Id.; see* G.L. c. 211A, § 10(A).

[13] 1975 Mass. Adv. Sh. at 966, 325 N.E.2d at 575.

[14] Brief for Respondent, *supra* note 10, at 9.

[15] 194 Mass. 481, 80 N.E. 690 (1907).

[16] *Id.* at 485, 80 N.E. at 693.

[17] Snow v. Van Dam, 291 Mass. 477, 480-81, 197 N.E. 224, 226 (1935).

[18] *See* 1975 Mass. Adv. Sh. at 962, 325 N.E.2d at 574.

[19] *See* Philbrick, *Limits of Record Search and Therefore of Notice,* 93 U. PA. L. REV. 125, 171-72 (1944).

only incidentally to create an easement or restriction in the servient estate. "As a matter of legal analysis it must be admitted that a part of the 'title' to [the servient estate] is held by the owner of the dominant tenement."[20]

One commentator has suggested that the proper approach is to view the problem as involving the balancing of equities between the two innocent purchasers.[21] This necessitates a weighing of the burden placed upon the subsequent purchaser if he is required to check all "deeds out" from the common grantor. In gauging this burden, distinctions could be drawn based upon the size of the subdivision. In a small subdivision, in which there are very few "deeds out," the burden of checking these deeds would appear to be slight and it might not be deemed unfair to conclude that they are within the range of a reasonable title search. On the other hand, in the case of a large development, the burden could be substantial and the subsequent purchaser should be allowed to disregard the restrictions contained in "deeds out."

In "balancing the equities," the court may also wish to inquire whether the owner of the dominant estate seeking to enforce the restriction had alternative means for affording notice of the restriction that would reduce the subsequent purchaser's burden of checking the "deeds out." One obvious technique is to have the developer incorporate the restrictions into a master plan or plat that is recorded. The major practical drawback to that practice is that it would deprive the developers of "flexibility in responding to experience gathered in marketing the first homes in the subdivision. Furthermore, a master plan is seldom used in the case of isolated transactions where a single large lot is subdivided into only two or three smaller lots."[22] An alternative approach would be for the developer to convey all of the lots in the subdivision to a strawman. The strawman would then convey all but one lot back to the developer with the restrictions stated as mutual in the deed. The strawman would then proceed to convey the one lot he has retained to the first purchaser and would include in the deed a reference to the restrictions of the prior deed from the strawman to the developer. This would place the restrictions in the chain of titles of all of the lots in the subdivision.

In the *Guillette* case, the Court did not explicitly engage in such a balancing process. It relied upon the reference in both deeds to a recorded subdivision plan and concluded that "[a] search for such deeds is a task which is not at all impossible."[23] Although requiring the sub-

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[20] *Id.* at 172.

[21] *See* Ryckman, *Notice and the "Deeds Out" Problem,* 64 MICH. L. REV. 421, 434-39 (1966) [hereinafter cited as Ryckman].

[22] *Id.* at 438.

[23] 1975 Mass. Adv. Sh. at 966, 325 N.E.2d at 575.

sequent purchaser to check all previous "deeds out" may not necessarily be an "impossible" task, the question really is whether it is inequitably burdensome. Furthermore, the Court's reliance on the existence in Massachusetts of a grantor-grantee indexing system,[24] rather than a tract indexing system, is misplaced because the index will merely reveal the existence of a "deed out."[25] The subsequent purchaser can safely discern whether there is a restriction on his tract only by a careful reading and analysis of the deeds. In addition, the reference in both deeds to the recorded plan would not mitigate the title searcher's burden in *Guillette* because the recorded plan did not mention the restrictions.[26] Nevertheless, the Court's reliance on the reference to the recorded plan[27] raises a question whether the result would have been different if there had been no such recorded plan or if there had been no reference in the deeds to a recorded plan.

The opinion also does not explicitly provide an answer to other issues existing in this area of the law. For example, should distinctions be drawn between easements and restrictive convenants? Likewise, is there any justification for different treatment for easements by implication and easements by necessity?[28]

The Court did not refer to any empirical data that would reflect the conveyancing bar's treatment of the problem. This should be contrasted with the Court's emphasis in *Morse v. Curtis*[29] on "the practical construction which lawyers and conveyancers have given to our registry laws."[30]

§16.2. Real Estate Broker's Commission: When Earned. *Tristram's Landing, Inc. v. Wait,*[1] decided during the *Survey* year, constitutes a major and sudden change in the law pertaining to broker's commissions. In *Tristram,* the Court rejected[2] the "clear rule," articulated only two years ago in *Gaynor v. Laverdure,*[3] that in the absence of a special agreement providing otherwise, a broker has earned his commission when he has provided "a customer ready, able and willing to buy upon the terms and for the price given the broker by the owner."[4] Under this "clear rule," the broker earns his commission when he

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[24] G.L. c. 36, §§ 25, 26.

[25] *See* 1975 Mass. Adv. Sh. at 965, 325 N.E.2d at 575. In fact, use of a tract index might lessen the burden. *See* Ryckman, *supra* note 21, at 435.

[26] 1975 Mass. Adv. Sh. at 962, 325 N.E.2d at 573.

[27] *See id.* at 966, 325 N.E.2d at 575.

[28] *See* Ryckman, *supra* note 21, at 447-49.

[29] 140 Mass. 112, 2 N.E. 929 (1885).

[30] *Id.* at 115, 2 N.E. at 931.

§16.2. [1] 1975 Mass. Adv. Sh. 1360, 327 N.E.2d 727.

[2] *Id.* at 1366, 1370, 327 N.E.2d at 730, 731.

[3] 1973 Mass. Adv. Sh. 111, 291 N.E.2d 617.

[4] *Id.* at 114, 291 N.E.2d at 620, *quoting* Henderson & Beal, Inc. v. Glen, 329 Mass. 748, 751, 110 N.E.2d 373, 375 (1953).

provides such a customer even though the realty owner and customer do not enter a contract. If no contract is made, the broker has the burden of proving that his customer was ready, willing, and able to buy on the owner's terms.[5] If the owner and the customer enter into a binding contract, the owner is precluded from subsequently questioning the customer's ability to make the purchase.[6] Thus, even though the customer defaults on the contract, the broker is entitled to his commission under this "clear rule."[7] Although the Court in *Gaynor* acknowledged the development of a trend of case law contrary to this rule,[8] it adhered to its traditional approach.[9] At the same time, it indicated that it might have been inclined to reconsider its rule in a fact situation involving a substantial inequality of bargaining power between the broker and the other party involved, such as a person "selling his residence once in his lifetime," but concluded that such inequality had not been demonstrated on the record in the *Gaynor* case.[10]

Tristram constitutes a revolutionary departure. The Court, following the developing trend in this area, held that in the absence of a special agreement, a broker earns his commission only when, and if, the sale is consummated.[11] It felt that this rule "provides necessary protection for the seller and places the burden with the broker, where it belongs."[12] Because there was a waiver of the counts originally brought in *quantum meruit*,[13] the Court did not consider the extent to which a broker might be entitled to share in a forfeited deposit or other benefit received by the seller as a result of the broker's efforts.

Is it possible for the seller and the broker to enter into an agreement under which the broker will be entitled to a commission even if the sale is not consummated? Although the Court felt that it might be desirable to require that such agreements be in writing to be enforceable, it refrained from establishing that requirement by judicial decision, concluding that such a requirement should be imposed, if at all, by the Legislature.[14] Nonetheless, because of the potential inequality of bargaining power between brokers and some sellers who are unfamiliar with their legal rights, the Court indicated that such agreements would be scrutinized carefully.[15] It then issued an ominous

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[5] *Id.* at 115, 291 N.E.2d at 621.
[6] *Id.* at 116, 291 N.E.2d at 621.
[7] *Id.*
[8] *See, e.g.,* Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 551, 236 A.2d 843, 855 (1967).
[9] 1973 Mass. Adv. Sh. at 121, 291 N.E.2d at 624.
[10] *Id.*
[11] 1975 Mass. Adv. Sh. at 1370, 327 N.E.2d at 731.
[12] *Id.*
[13] *Id.* at 1363 n.2, 327 N.E.2d at 728-29 n.2.
[14] *Id.* at 1371, 327 N.E.2d at 731.
[15] *Id.*

warning to brokers that such special agreements could be invalidated as unconscionable or against public policy.[16] The Court also held that if the failure of completion of the contract results from the seller's wrongful act, the broker should be entitled to his commission.[17]

There was an alternative narrower ground for the Court's decision. The agreement provided that a commission of "five (5) percent on the said sale is to be paid to . . . [the broker] by the said seller."[18] Even under the now-abrogated old rule, this, in the opinion of the Court, would amount to a "special agreement" under which consummation of the sale became a condition precedent for the earning of a commission.[19]

§16.3. Recording: Modification of Recorded Instruments. *Snyder v. Sperry & Hutchinson Co.*,[1] decided by the Supreme Judicial Court during the *Survey* year, poses a problem for the title searcher. In that case, Sperry & Hutchinson Co. ("S & H") leased premises in 1961 from the Marion Trust, the owner of the property at that time.[2] The lease ran for a term of 5 years from May 1, 1961 to April 30, 1966, and S & H was given an option to extend the lease for an additional 5 years until April 30, 1971.[3] A "notice of lease," executed by the parties on June 17, 1961, was recorded.[4] In 1964, the Marion Trust sold the premises to the Brookline Masonic Building Association (the "seller") subject to the lease. In June, 1965, the seller and S & H entered into an agreement providing that on the expiration of the original five-year term, the lease would be extended for a period of two years expiring on April 30, 1968, and granting S & H an option to extend it further to April 30, 1970. This agreement was not recorded.[5] In October, 1967, the seller and S & H agreed on still another modification under which the lease was extended from May 1, 1968 to April 30, 1970, and S & H was given an option to extend it for an additional two years from May 1, 1970 to April 30, 1972, by giving notice on or before October 31, 1969.[6] The seller could cancel the option by giving S & H written notice by April 30, 1969. This agreement was not recorded.[7]

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[16] *Id.*
[17] *Id.* at 1370, 327 N.E.2d at 731.
[18] *Id.* at 1363, 327 N.E.2d at 729.
[19] *Id.* at 1366-67, 327 N.E.2d at 730.

§16.3. [1] 1975 Mass. Adv. Sh. 2463, 333 N.E.2d 421.
[2] *Id.* at 2464, 333 N.E.2d at 423.
[3] *Id.* at 2464-65, 333 N.E.2d at 423.
[4] *Id.* at 2465, 333 N.E.2d at 423.
[5] *Id.*
[6] *Id.*
[7] *Id.*

On May 11, 1968, the seller and the plaintiff entered into a purchase and sale agreement in which the plaintiff agreed to buy the premises subject to the lease to S & H, which was described as "for a term of years expiring April 30, 1970."[8] Title passed on July 10, 1968, and the deed recited: "This conveyance is made subject to and with the benefit of Lease of said premises to . . . [S & H], dated March 16, 1961 (together with Amendments), a Notice of which is recorded with said Deeds in Book 3921, Page 404, which Lease and Amendments are hereby assigned to the Grantee."[9] The plaintiff took title with actual knowledge of only the 1965 agreement and not of the 1967 agreement.[10] Thus, although the plaintiff knew that S & H had an option to extend the lease until April 30, 1970, it was unaware of the second option to extend it until April 30, 1972.

S & H notified the plaintiff on May 28, 1969, that, in accordance with the 1967 amendments to the lease, it was exercising its option to extend the lease for two years from May 1, 1970 to April 30, 1972.[11] The issue presented to the Court was whether S & H could remain in possession beyond April 30, 1970, even though the 1967 lease modification had not been recorded. The plaintiff contended that since the original 1961 lease was required to be recorded under section 4 of chapter 183 of the General Laws, any modification of that lease also had to be recorded in order to protect the lessee against a subsequent bona fide purchaser without actual notice of the modification.[12]

The recording statute requires that leases in excess of seven years be recorded to be valid against a subsequent bona fide purchaser without notice.[13] In determining whether a lease is in excess of seven years, the basic term and all extension and renewal periods are aggregated. Thus, a lease for five years coupled with an option to extend or

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[8] *Id.*

[9] *Id.* at 2466, 333 N.E.2d at 424.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 2467, 333 N.E.2d at 424.

[13] G.L. c. 183, § 4. Section 4 provides in part:

> [A] lease for more than seven years from the making thereof, shall not be valid as against any person, except the . . . lessor, his heirs and devisees and persons having actual notice of it, unless . . . a notice of lease, as hereinafter defined, is recorded in the registry of deeds for the county or district in which the land to which it relates lies. A "notice of lease", as used in this section, shall mean an instrument in writing executed by all persons who are parties to the lease of which notice is given and shall contain the following information with reference to such lease:— . . . the term of such lease, with the date of commencement of such term and all rights of extension or renewal.

G.L. c. 183, § 4, was amended by Acts of 1973, c. 205, to cover "assignments of rents or profits from an estate or lease" as well as other forms of conveyances. The Court in *Snyder* specifically refused to consider the possible effects of the amendments on the issues before it, since the events in question took place prior to those amendments. 1975 Mass. Adv. Sh. at 2468 n.2, 333 N.E.2d at 424 n.2.

renew for an additional five years must be recorded.[14] Nevertheless, the Court in *Snyder* held that the maximum term under the modification agreements, including options to extend, was less than seven years (running from June, 1965 to April 30, 1972) and hence the options granted under the modification agreements did not have to be recorded and were enforceable against the plaintiff, even though he did not have actual notice of the option to extend until April 30, 1972.[15] In reaching that conclusion, the Court segregated the modification periods from the terms specified in the basic recorded lease. In doing so, it treated S & H as a totally new tenant who entered into new unrecorded lease arrangements with the seller in 1965 and 1967. The Court reasoned that a new tenant would not have had to record his lease agreements merely because there was a prior recorded lease with another tenant and therefore concluded that S & H should not be required to do so either.[16]

It is submitted that the Court's analogy to the situation of a new tenant is inapposite. Since there was an existing, recorded lease with S & H, the plaintiff could justifiably have relied upon it in the absence of actual notice of any modification thereof. Thus, those who seek to modify a prior recorded instrument should be required to record the modification. Although the Court assumed that the plaintiff could adequately protect himself by consulting his seller and the lessee,[17] the Court's subsequent conclusion that the seller was liable for deceit,[18] casts considerable doubt on that supposition.

The *Snyder* opinion leaves a number of problems unresolved. Because the Court segregated the modification periods from the basic lease term and found that the modification periods did not exceed seven years, it did not deal with the effect of the lessor's right to cancel the option. Even if the modification periods had exceeded seven years, it could have been contended that the lessor's cancellation rights prevented the lease from being in excess of seven years.[19] In addition, the opinion is unclear whether each of the modification periods would be segregated from the other modification periods if the various periods covered by the modification agreements were, in the aggregate, in excess of seven years, but each period, by itself, was less than seven years. Although the decision could support such a segregation if carried to its logical extreme, such a reading would open the door to flagrant evasions of the recording statute.

Another situation not directly touched upon is that where the primary lease is for less than seven years and hence not required to be re-

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[14] Toupin v. Peabody, 162 Mass. 473, 477, 39 N.E. 280, 281 (1895).
[15] 1975 Mass. Adv. Sh. at 2469, 333 N.E.2d at 424-25.
[16] *Id.* at 2469-70, 333 N.E.2d at 425.
[17] *Id.* at 2470, 333 N.E.2d at 425.
[18] *See id.* at 2479-81, 333 N.E.2d at 428-29.
[19] *See* Fanger v. Leeder, 327 Mass. 501, 506-07, 99 N.E.2d 533, 536 (1951).

corded, and there are subsequent amendments, inserting an option to extend, that, if measured from the date of the execution of the primary lease would create a term in excess of seven years.[20] The logic of *Snyder* should dictate that such an amendment should not by itself render the primary term recordable, although cautious draftsmen would be well advised to record in such cases.[21]

To some extent, *Snyder* illustrates the principle that hard cases make bad law. The Court indicated that it was not impressed with the plaintiff's argument that it could justifiably have relied on the 1961 recorded lease since the plaintiff conceded that it had actual notice of the unrecorded agreement of 1965, which itself changed the terms of the lease from those contained in the recorded 1961 lease.[22] Thus, the Court implied that the plaintiff, on actual notice that the recorded lease had been modified, should have inquired further to determine if other modifications had occurred, instead of relying on the notice of lease, which it knew did not reflect all of the lessee's rights.

There was an alternative basis for the Court's conclusion. The Court also relied upon the recital in the deed to the plaintiff that the deed was subject to a "Lease of said premises . . . dated March 16, 1961 (together with Amendments)."[23] Relying upon *Leominster Gas Light Co. v. Hillery,*[24] the Court held that the plaintiff, as the purchaser of the reversion after expiration of the lease, took title subject to the 1961 lease and amendments thereto, and all covenants running with the land contained in those amendments, including specifically the option to extend until April 30, 1972.[25]

The *Snyder* decision also treated the question whether the plaintiff could receive damages from the seller on a breach of warranty theory. In the purchase and sale agreement, the seller warranted that the only lease in existence was a lease for a term of years expiring on April 30, 1970.[26] If the plaintiff had not accepted a deed, he might have been able to rescind the agreement.[27] Since the plaintiff accepted a deed that contained no such warranty, however, the Court concluded that the warranty was merged into the deed.[28] Thus, the Court applied the general rule that acceptance of a deed merges all express and implied covenants contained in the purchase and sale agreement and discharges all such obligations except those specified in the deed

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[20] *See* E. SCHWARTZ, LEASE DRAFTING IN MASSACHUSETTS § 5.12 (1961).
[21] *See id.*
[22] *See* 1975 Mass. Adv. Sh. at 2470, 333 N.E.2d at 425.
[23] *Id.*
[24] 197 Mass. 267, 269, 83 N.E. 870, 871 (1908).
[25] 1975 Mass. Adv. Sh. at 2471-72, 333 N.E.2d at 425.
[26] *Id.* at 2473, 333 N.E.2d at 426.
[27] *See* Downey v. Levenson, 247 Mass. 358, 363, 142 N.E. 85, 86 (1924).
[28] 1975 Mass. Adv. Sh. at 2473-74, 333 N.E.2d at 426.

itself,[29] and rejected the plaintiff's breach of warranty claim.

The Court also held that the plaintiff could not recover on the basis of the warranty against encumbrances that appeared in the deed.[30] Although the Court held that a lease is an encumbrance, that the deed made the conveyance subject to the amended lease led it to conclude that no breach had occurred.[31]

Nonetheless, the Court did sustain the plaintiff's claim for damages against the seller on the basis of misrepresentations made by the seller that the only leasehold encumbrance was a lease expiring on April 30, 1970.[32] Although the Court found the seller's misrepresentations unintentional, it allowed recovery on the basis of false statements made, as of the seller's own knowledge, of matters of fact that were susceptible of actual knowledge.[33] In such circumstances, it has been consistently held that scienter is not a prerequisite to recovery.[34]

§16.4. Recording: Notice of Lease and Option to Purchase. In *Mister Donut of America, Inc. v. Kemp,*[1] the Supreme Judicial Court held that the notice of lease that must be recorded under section 4 of Chapter 183 of the General Laws need not list any options to purchase granted with the lease.[2] In *Kemp*, the plaintiff was the assignee of a lease of the premises for a term of twenty years. The lessor subsequently granted the fee to the defendant. The Plymouth-Home National Bank held a mortgage upon the premises that had been executed by the defendant. Paragraph eleven of the lease gave the plaintiff lessee the option to purchase the premises during the period from the sixth to twentieth year.[3] A pasted overlay strip containing a substitute paragraph ten, unless lifted, hid most of paragraph eleven from view. Although the entire lease was not recorded, a notice of lease was recorded,[4] as was required by state law.[5] The notice of lease contained the following language: "Rights of extension and renewal, if any: None."[6]

The defendant was given a photocopy of the lease when he took title to the premises. Although this copy contained a legible reproduction of a portion of the option paragraph, "containing clues pointing

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[29] *See* Pybus v. Grasso, 317 Mass. 716, 717, 59 N.E.2d 289, 290 (1945).
[30] 1975 Mass. Adv. Sh. at 2476, 333 N.E.2d at 427.
[31] *Id.*
[32] *Id.* at 2481, 333 N.E.2d at 429.
[33] *Id.* at 2478-79, 333 N.E.2d at 428.
[34] *See* Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 404, 18 N.E. 168, 169 (1888); *cf.* Yorke v. Taylor, 332 Mass. 368, 371, 124 N.E.2d 912, 914 (1955).

§16.4. [1] 1975 Mass. Adv. Sh. 2125, 330 N.E.2d 810.
[2] *Id.* at 2130, 330 N.E.2d at 813.
[3] *Id.* at 2126, 330 N.E.2d at 812.
[4] *Id.* at 2127, 330 N.E.2d at 812.
[5] G.L. c. 183, § 4. For the text of § 4 see § 16.3, note 13, *supra.*
[6] 1975 Mass. Adv. Sh. at 2127, 330 N.E.2d at 812.

to a passage to title to real estate,"[7] neither the defendant nor the bank had actual knowledge of the options because the overlay hid the option paragraph from view.[8] The superior court entered a decree dismissing the plaintiff's bill in equity for specific performance of the option clause against the defendant and the bank.[9] The Supreme Judicial Court granted the plaintiff's application for direct appellate review[10] and reversed the decree, holding that the defendant and the bank had constructive notice of the plaintiff's option to purchase.[11]

In reaching this conclusion, the Court adhered to its traditional view that the term "actual notice," as used in the recording statute, is to be strictly construed.[12] Under that view, a party is not charged with knowledge of facts that would ordinarily put an ordinary prudent person on inquiry.[13] Hence, the Court in *Kemp* concluded that the defendant and the bank did not have "actual notice" of the option to purchase.[14]

The statute requires that the notice of lease contain "all rights of extension or renewal."[15] Although the recorded notice of lease in *Kemp* contained no reference to the option to purchase, the Court concluded that the notice satisfied the statutory requirements because, in its opinion, an option to purchase is not a "right of extension or renewal."[16] Furthermore, the Court found a legislative intent to give the recordation of a notice of lease in statutory form the same legal effect as recordation of the entire lease.[17] Thus, the defendant and the bank were deemed to have constructive notice of the option to purchase on the grounds that a proper notice of lease had been recorded and a careful inspection of the original lease would have revealed the option.[18]

It is submitted that it is doubtful that the Legislature intended to restrict the term "extensions or renewals," as used in the notice-of-lease statute, to the technical meaning adopted by the Court. An option to purchase that has been conferred upon a lessee can be analogized in many respects to an extension or renewal. Certainly, from the vantage point of the subsequent purchaser, their effects are substantially identical. If anything, the option to purchase has a great-

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[7] *Id.*
[8] *Id.*
[9] *Id.* at 2126, 330 N.E.2d at 812.
[10] *Id.*; *see* G.L. c. 211A, § 10(A).
[11] 1975 Mass. Adv. Sh. at 2131, 330 N.E.2d at 813.
[12] *Id.* at 2128, 330 N.E.2d at 813.
[13] Toupin v. Peabody, 162 Mass. 473, 478, 39 N.E. 280, 281 (1895).
[14] 1975 Mass. Adv. Sh. at 2129, 330 N.E.2d at 813.
[15] G.L. c. 183, § 4.
[16] 1975 Mass. Adv. Sh. at 2130, 330 N.E.2d at 813.
[17] *Id.*
[18] *Id.* at 2129, 2131, 330 N.E.2d at 813.

er effect upon the subsequent purchaser.

In *Kemp*, no contention was made that the option to purchase was independent of the lease.[19] If the option were viewed as an independent grant, in the words of one authority:

> [t]he legal consequences, so far as third persons without actual notice are concerned, are the same as if no lease were executed, and the option must be considered as if it were standing alone. Prior to exercise of an option to purchase, it is a mere contract right, there is no applicable recording statute and a subsequent grantee or lessee without actual notice will take free of the option. After exercise of the option, it ripens as against third persons.[20]

The same authority had previously expressed doubts as to the status of an option to purchase that is interdependent with the other provisions of a lease under the recording laws.[21] The *Kemp* opinion assumes that such an option is as much a part of the lease as any other term thereof and that the principles of law applicable to the recording of leases generally apply to the option.

§16.5. Effect of a Change in Zoning of the Marketability of a Title. In *Dover Pool & Racquet Club, Inc. v. Brooking,*[1] decided during the *Survey* year, the Court was faced with determining whether a zoning change allows a purchaser to rescind a purchase contract on the grounds that the zoning change made the title unmarketable. The doctrine of marketable title has its roots in the early English case of *Stapylton v. Scott,*[2] where the court refused to compel a vendee to take a "doubtful" title from the vendor.[3] The court stated that "it has been held repeatedly, that, though in the judgment of the Court, the better opinion is, that a title can be made, yet, if there is a considerable, a rational, doubt, the Court has not attached so much credit to its own opinion as to compel a purchaser to take a title."[4] This concept of marketable title was adopted in the United States[5] and in Massachusetts;[6] the Supreme Judicial Court has defined a marketable title as one free from reasonable doubts.[7]

Even though the purchase and sale agreement is silent as to the sort of title to be conveyed, there is an implied warranty that the title

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[19] *Id.* at 2131, 330 N.E.2d at 813.
[20] E. SCHWARTZ, LEASE DRAFTING IN MASSACHUSETTS § 5.13 (1961).
[21] *See id.*

§16.5. [1] 1975 Mass. Adv. Sh. 73, 322 N.E.2d 168.
[2] 33 Eng. Rep. 988 (1809).
[3] *Id.* at 989.
[4] *Id.*
[5] *See* Annot., 57 A.L.R. 1253 (1928).
[6] *See* Swan v. Drury, 39 Mass. (22 Pick.) 485, 489 (1839).
[7] Mishara v. Albion, 341 Mass. 652, 654, 171 N.E.2d 478, 480 (1961).

is marketable.[8] This had led draftsmen of purchase and sale agreements to insert clauses that attempt to negate the impact of marketable title by providing for the conveyance of "a good and clear record and marketable title, free of encumbrances, except . . . ." The draftsman would then list the various interests subject to which the buyer agrees to take title, and as to which he waives his objections at the date of closing.

In *Dover Pool,* the Court was concerned with the interrelationship of marketable title and zoning restrictions and the construction of an 'exception" clause in the purchase and sale agreement. In that case, the defendant seller and the plaintiff buyer entered into a written contract on January 31, 1972 for the sale of real estate.[9] A few days earlier, unknown to the parties, the planning board had published a notice of a public hearing on a proposed amendment to the zoning by-law.[10] The proposed amendment required a special permit for the use of the premises that the defendant knew was contemplated by the plaintiff.[11] The defendant had used the premises as a single family residence. The plaintiff intended to use the premises for a nonprofit tennis and swim club.[12]

The zoning by-law in effect at the date of the execution of the purchase and sale agreement permitted the use of the premises as of right for a "club when not conducted for profit and not containing more than five sleeping rooms."[13] The parties discussed the existing zoning law prior to the execution of the purchase and sale agreement. The defendant had asked the broker about it and the broker replied "everything would be all right under the existing" by-law.[14] The vice-president of the defendant, who signed the agreement, checked the existing zoning by-law prior to the execution of the agreement.[15]

The purchase and sale agreement provided for the conveyance of "a good and clear record and marketable title thereto, free from encumbrances, except (a) Provisions of existing building and zoning laws . . . ."[16] The agreed closing date was March 1, 1972. The planning board published notice on January 27, 1972 and February 3, 1972, of a public hearing on February 14, 1972, on a proposed amendment to the zoning by-laws that would require a permit for use of the premises as a nonprofit recreational facility.[17] Neither of the parties was

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[8] *See* Smith v. Greene, 197 Mass. 16, 17-18, 83 N.E. 9, 10 (1907).
[9] 1975 Mass. Adv. Sh. at 75, 322 N.E.2d at 169.
[10] *Id.*
[11] *See id.* at 74, 75, 322 N.E.2d at 169.
[12] *Id.* at 74, 322 N.E.2d at 169.
[13] *Id.*
[14] *Id.* at 74-75, 322 N.E.2d at 169.
[15] *Id.* at 75, 322 N.E.2d at 169.
[16] *Id.*
[17] *Id.*

aware of the notice prior to the execution of the agreement, but the plaintiff became aware of it about ten days before the agreed closing date of March 1, 1972.[18] When the parties met at the closing, the plaintiff refused to proceed with the purchase.[19] The proposed zoning amendment was adopted on March 21, 1972, and approved by the Attorney General in July, 1972.[20]

The plaintiff then obtained rescission of the contract and return of its deposit in the superior court.[21] On appeal, the Supreme Judicial Court affirmed the action of the superior court.[22]

One of the threshold issues in *Dover Pool* was whether zoning restrictions affect the marketability of title. Generally speaking, most courts have held that a zoning restriction that is in existence at the time of the execution of the purchase and sale agreement is not the kind of encumbrance that can be used to avoid the contract.[23] This result is usually rationalized on the basis that the zoning ordinance is a matter of public record and hence is easily ascertainable and equally open and accessible to both parties, invoking the maxim *"Ignorantia legis neminem excusat"* so as to preclude any claim based upon the zoning restrictions.[24] Likewise, it is generally held that a zoning restriction adopted after the signing of the contract does not affect the marketability of the title on the grounds that the parties are deemed to assume the risks of changes in the law.[25]

In some cases, however, rescission has been decreed on the basis of a misrepresentation made by the vendor as to the zoning status of the premises.[26] Some decisions in other jurisdictions have denied specific performance to a vendor who knew of the vendee's intended use where such intended use is thwarted by an amendment to the zoning law after the execution of the contract.[27] These decisions are prem-

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 74, 322 N.E.2d at 169.

[22] *Id.* at 80, 322 N.E.2d at 171.

[23] *See* Dunham, *Effect on Title of Violations of Building Covenants and Zoning Ordinances,* 27 ROCKY MOUNTAIN L. REV. 255, 257-58 (1955); Comment, 5 DEPAUL L. REV. 263, 270 (1955); Annot., 39 A.L.R.3d 362 (1971).

[24] *See, e.g.,* Kazwell v. Reynolds, 250 Ill. App. 174, 177 (1st Dist. 1928).

[25] *See* Comment, 5 DEPAUL L. REV. 263, 271 (1955). *Cf.* Essex-Lincoln Garage, Inc. v. Boston, 342 Mass. 719, 175 N.E.2d 466 (1961), where the Court stated, in the context of a suit seeking rescission of a lease of a public parking facility: "The trial judge's conclusion that 'the so-called doctrine of frustration does not apply' was not erroneous as a matter of law but, to the contrary, is supported by the authorities. . . . It is well known that traffic regulations are subject to change. Such change was a risk assumed by the plaintiff." *Id.* at 721-22, 175 N.E.2d at 467-68.

[26] *See* Kannavos v. Annino, 356 Mass. 42, 46-47, 247 N.E.2d 708 (1969).

[27] *See, e.g.,* Clay v. Landreth, 187 Va. 169, 179-80, 45 S.E.2d 875, 880 (1948). *See generally* Annot., 39 A.L.R.3d 362, 416-17 (1971).

ised upon the theory that it would be inequitable to grant specific performance in such circumstances.

In *Dover Pool,* the Court never reached the ultimate issue because the agreement explicitly provided that "existing" zoning laws were not included in the vendor's obligation to convey a marketable title.[28] In construing this exception clause, the Court held that the word "existing" referred to laws existing at the date of closing rather than the date of the execution of the contract.[29] The Court then pointed out that although the amendment had not been officially adopted as of the date of closing and was therefore not technically an existing zoning law at the time of closing, under state law,[30] a subsequent adoption of an amendment would relate back so as to invalidate the issuance of a building permit on the commencement of work after the publication of notice of the proposed amendment.[31] Thus, in a practical, if not technical sense, the amendment was "existing" both at the date of the execution of the agreement and the date of the scheduled closing. Nevertheless, the Court concluded that rescission should be granted on the basis of mutual mistake despite the fact that its apparent unwillingness to base rescission on the doctrine of marketable title. The Court asserted that

> at the time the contract was made both parties made the assumption that the zoning by-laws interposed no obstacle . . . . That assumption was mistaken, and we think it was a basic assumption on which the contract was made. . . . [A] right of vital importance to the purchaser did not exist, and as a result of the mistake enforcement of the contract would be materially more onerous to the purchaser than it would have been had the facts been as the parties believed them to be. The contract was therefore voidable by the purchaser . . . .[32]

The decision leaves a number of areas of uncertainty. It fails to lay down any general guidelines as to the circumstances that warrant rescission for mutual mistake. To some extent, the nature of mutual mistake precludes everything but an *ad hoc* approach to the problem. Yet, there are some areas, such as the setting aside of a release on the grounds that one's losses turned out to be more serious than expected, where the Court has been more reluctant to apply the defense of mutual mistake.[33] In addition, the *Dover Pool* opinion does not

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[28] 1975 Mass. Adv. Sh. at 76-77, 322 N.E.2d at 170.

[29] *Id.* at 77, 322 N.E.2d at 170.

[30] G.L. c. 40A, § 11.

[31] 1975 Mass. Adv. Sh. at 78, 322 N.E.2d at 170.

[32] *Id.* at 79-80, 322 N.E.2d at 170-71.

[33] *See* Century Plastic Corp. v. Tupper Corp., 333 Mass. 531, 533-35, 131 N.E.2d 740, 741-42 (1956); Tewksbury v. Fellsway Laundry, Inc., 319 Mass. 386, 388-89, 65 N.E.2d 918, 919 (1946); *cf.* Rankin v. N.Y., N.H. & H.R.R., 338 Mass. 178, 187-88, 154 N.E.2d 613, 619 (1958).

specify whether the mistake was one of law or fact and fails to indicate whether different standards would apply for different kinds of mistakes.[34]

Dover Pool has important implications for the draftsman of a purchase and sale contract. In drafting the "exception" clause, care must be taken to define the word "existing" in terms of the time to which reference is made (date of contract or date of closing). In addition, the word must be defined with respect to the operative date of a zoning amendment. A change could be defined as existing on either the date it is proposed, the date notice is published, the date it is adopted by the town, or the date it is approved by the Attorney General. The draftsman should not leave the matter to conjecture; the instrument should explicitly specify the intended dates. Furthermore, the vendor's draftsman should insert language that indicates "deliberate risk taking" of an unknown zoning change by the purchaser to avoid rescission on mutual mistake grounds.[35]

§16.6. Leases: Effect of a Taking by Eminent Domain. *Saugus Auto Theatre Corp. v. Munroe Realty Corp.*,[1] decided during the *Survey* year, sanctions a drafting technique for equitably accommodating the interests of both the lessor and the lessee in the event that the leased premises are taken by eminent domain. Quite frequently, leases contain a clause providing that a lessor may unilaterally terminate a lease "in case said premises or building or any part thereof shall be taken by any exercise of the right of eminent domain . . . which election may be made notwithstanding the lessor's interest may have been divested." The latter part of this clause is inserted to preserve the right of the lessor to prevent the lessee from sharing in any condemnation award.[2] Such a provision operates inequitably where a tenant has improved the land and built up good will over the years and thus will suffer a loss if his interest terminates on the condemnation of only a small portion of the land. On the other hand, termination of the entire tenancy may be justified where the "extent of land taken is such that the rental value of the remaining land is seriously affected."[3]

In *Saugus Theatre*, the leased premises consisted of 13 acres which were employed in the operation of a drive-in theatre with a capacity of 650 to 700 cars.[4] The Commonwealth subsequently took 2.15 acres of the leased land by eminent domain. This taking reduced by 30 the

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[34] *See* Reggio v. Warren, 207 Mass. 525, 533-36, 93 N.E. 805, 806-07 (1911).

[35] The Court in *Dover Pool* implied that it would enforce such a waiver. *See* 1975 Mass. Adv. Sh. at 80, 322 N.E.2d at 171.

§16.6. [1] 1974 Mass. Adv. Sh. 2021, 318 N.E.2d 615.

[2] *See* Newman v. Commonwealth, 336 Mass. 444, 447, 146 N.E.2d 485, 487 (1957).

[3] *Saugus Theatre,* 1974 Mass. Adv. Sh. at 2024, 318 N.E.2d at 616.

[4] *Id.* at 2021, 318 N.E.2d at 615.

number of cars that could be accommodated in the theatre.[5] There was some evidence that the theatre was filled to capacity only on Memorial Day and Labor Day.[6] The lease provided that the lessor might terminate it "if the premises or any substantial portion thereof are taken by public authority."[7]

The superior court entered a decree recognizing the continuance of the lease on the grounds that the "taking of somewhat less than two acres was not a taking of a substantial portion of the leased premises."[8] The Appeals Court reversed and ordered the entry of a decree declaring that the lessor was entitled to expel the tenant.[9] The Supreme Judicial Court then reversed the decision of the Appeals Court and remanded the case to the superior court for the reentry of the decree of superior court judge.[10]

The Court distinguished the decisions in which similar termination clauses had been enforced[11] on the basis that the lease provisions in those cases were broader and permitted the lessor to terminate on any taking of the premises.[12] The addition of the word "substantial" was a crucial difference because the Court viewed it as designed to achieve an accommodation of the interests of the lessor and lessee.[13] In determining the substantiality of the taking, the Court refused to limit itself to an area comparision of the portion taken to that remaining, holding that the nature and character of the land actually taken must be considered.[14] Thus, it held that although 15 percent of the land had been taken, this loss was not substantial because "there was a loss of but thirty car spaces of the total 650 to 700 car capacity of the theatre, spaces for which there was little need since the theatre was rarely full," concluding that the effective use of the premises had been diminished by a mere 4 percent.[15]

Although the Court's approach does inject some uncertainty and could be viewed as an attempt to resolve the interpretation process with the aid of twenty-twenty hindsight, it is justifiable as being fair to both parties. Those draftsmen who seek greater certainty can achieve it by specifying that a taking of a specific portion of the premises, in terms of acreage, will permit a termination at the election of the lessor.

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[5] *Id.* at 2021-22, 318 N.E.2d at 615-16.

[6] *Id.* at 2022 n.1, 318 N.E.2d at 616 n.1.

[7] *Id.* at 2022, 318 N.E.2d at 616.

[8] *Id.*

[9] 1974 Mass. App. Ct. Adv. Sh. 157, 306 N.E.2d 463.

[10] 1974 Mass. Adv. Sh. at 2025, 318 N.E.2d at 617.

[11] *See, e.g.,* Newman v. Commonwealth, 336 Mass. 444, 146 N.E.2d 485 (1957); Sparrow Chisholm Co. v. Boston, 327 Mass. 64, 97 N.E.2d 172 (1951); Goodyear Shoe Mach. Co. v. Boston Terminal Co., 176 Mass. 115, 57 N.E. 214 (1900).

[12] 1974 Mass. Adv. Sh. at 2023, 318 N.E.2d at 616.

[13] *Id.* at 2024, 318 N.E.2d at 616.

[14] *Id.*, 318 N.E.2d at 616-17.

[15] *Id.* at 2024-25, 318 N.E.2d at 617.

§16.7. Exercise of Option: Notice. *Korey v. Sheff*[1] involved a lease that provided for the exercise of an option to renew by the giving of notice in writing and recited that "any such notice . . . shall . . . be deemed duly given if and when mailed by registered mail." The Appeals Court held that such a lease does not require that written notice be sent by registered mail to the exclusion of other modes of transmission.[2] The drafting moral is clear: if registered mail is to be the sole means of notice, it should be explicitly mandated to be the sole permissible means of transmission in the lease.

§16.8. Mortgages: Foreclosures. During the *Survey* year, the courts were confronted with a number of interesting mortgage foreclosure issues. In *Beaton v. Land Court,*[1] the Court was faced with a challenge to the constitutionality of the procedures established to satisfy the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act").[2] State legislation provides for notice of a pending foreclosure proceeding to be given to all of the defendants named in the bill, with those persons entitled to the benefits[3] of the Act permitted to file a written appearance and an answer in which they claim that the foreclosure is invalid under the Act.[4] In those proceedings, however, only those entitled to the benefit of the Act are entitled to appear or be heard (except on behalf of a person so entitled), even though others may be named as defendants in the foreclosure action.[5] The subject matter of those proceedings is limited to the existence of protected individuals and the determination of their rights.[6]

In *Beaton,* the mortgagee filed a bill to foreclose the mortgage in the land court. A notice was issued to the mortgagor in the land court that stated: "If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended and you object to such foreclosure you or your attorney should file a written appearance and answer . . . or you may forever be barred from claiming that such foreclosure is invalid under said act."[7] The mortgagor presented an answer to the bill to foreclose in the land court, asserting three de-

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§16.7. [1] 1975 Mass. App. Ct. Adv. Sh. 703, 327 N.E.2d 896.
[2] *Id.* at 705, 327 N.E.2d at 897.

§16.8. [1] 1975 Mass. Adv. Sh. 1005, 326 N.E.2d 302, *appeal dismissed,* 96 S. Ct. 16 (1975).
[2] 50 U.S.C. App. §§ 501-90 (1970).
[3] Under the Act, any property owned by any individual who is a member of the armed forces or who has been discharged within the past three months cannot be subject to foreclosure proceedings without that individual's consent. 50 U.S.C. App. § 532(3) (1970).
[4] Acts of 1943, c. 57.
[5] Acts of 1959, c. 105, § 2.
[6] *Id.*
[7] 1975 Mass. Adv. Sh. at 1006-07, 326 N.E.2d at 303-04.

fenses: (1) the statutory procedure implementing the requirements of the Act was unconstitutional; (2) a bill in equity to redeem and discharge the mortgage was pending in the superior court; and (3) there had been no breach of the conditions of the mortgage.[8] The judges of the land court refused to accept the answer for filing on the ground that, under the state statutory procedure, persons not entitled to the benefits of the Act are not entitled to appear or be heard in such proceeding.[9]

The mortgagor then sought a writ of mandamus to compel the land court to accept the answer for filing.[10] A single justice of the Supreme Judicial Court sustained a demurrer to this petition and on appeal, the full Court affirmed the action of the single justice.[11]

The mortgagor contended that the foreclosure proceeding went far beyond the limited issue whether the mortgagors had rights under the Act, in that it could result in a final decree authorizing a sale of the fee.[12] Based upon *Fuentes v. Shevin,*[13] the mortgagor contended that the statutory procedure was unconstitutional and in violation of due process because the mortgagor was not given an opportunity to appear or be heard.[14] In addition, the mortgagor claimed that the distinction created by the statute between those who are allowed to appear and to answer and those who are not was violative of the equal protection clause of the fourteenth amendment.[15]

The Court found the mortgagor's contentions to be without merit.[16] Although recognizing that the statute prevented the mortgagor from raising a number of issues relating to the ultimate right of the mortgagee to foreclose in these particular proceedings, the Court concluded that such a limitation was not of constitutional significance because the mortgagor had other adequate procedures available to him in the same or in another forum where those issues might be raised.[17] "[M]andatory procedural segregation of various aspects of related claims or defenses is constitutionally permissible so long as all the available procedures combined satisfy the mandates of the due process clause."[18] Thus, the mortgagor could have brought a bill in equity in

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[8] *Id.* at 1009 n.5, 326 N.E.2d at 304 n.5.

[9] *Id.* at 1007-08, 326 N.E.2d at 304. The answer did not assert that the mortgagors were entitled to relief under the Act. *Id.* at 1009, 326 N.E.2d at 304.

[10] *Id.* at 1008, 326 N.E.2d at 304.

[11] *Id.* at 1009, 326 N.E.2d at 304-05.

[12] *Id.* at 1010, 326 N.E.2d at 305.

[13] 407 U.S. 67 (1972).

[14] 1975 Mass. Adv. Sh. at 1011, 326 N.E.2d at 305.

[15] Brief for Appellants at 10-11, Beaton v. Land Court, 1975 Mass. Adv. Sh. 1005, 326 N.E.2d 302.

[16] 1975 Mass. Adv. Sh. at 1019, 326 N.E.2d at 308.

[17] *Id.* at 1014-15, 326 N.E.2d at 306-07.

[18] *Id.* at 1013, 326 N.E.2d at 306.

the superior court to redeem and discharge the mortgage (which, in fact, he had done) and to enjoin the foreclosure. In such a proceeding, all of the relevant issues could have been litigated.[19] The mortgagor sought review in the United States Supreme Court and, by summary action, that Court dismissed the appeal.[20]

In *Outpost Cafe, Inc. v. Fairhaven Savings Bank,*[21] decided during the *Survey* year, the Appeals Court resolved the question of when property is sold pursuant to a power of sale contained in the mortgage. Is the sale complete, so as to foreclose the right to redeem, when the premises are "struck off" to the highest bidder and a memorandum of sale is executed at the foreclosure sale, or not until a deed is delivered to the purchaser? The Appeals Court held that the mortgagor's equity of redemption was barred at least as early as the point in time when the memorandum of sale is executed with the purchaser at the foreclosure sale and that the completion of foreclosure is not deferred until the delivery of a deed to the purchaser.[22] The Supreme Judicial Court denied further appellate review.[23]

§16.9. Condominiums: Conversion and Rent Control. To what extent do the provisions of the rent control statute, chapter 842 of the Acts of 1970,[1] preclude the conversion of an apartment house (containing rental units) to a condominium? Can tenants in a rent-controlled building be evicted to make way for the sale of apartments as condominium units? A clearer answer to these questions is to be found by comparing *Zussman v. Rent Control Board,*[2] decided during the *Survey* year, with the 1974 decision *Mayo v. Boston Rent Control Administrator.*[3]

Under section 9(a)(10) of the rent control statute, a tenant may be evicted for "just cause," provided that the purpose of such eviction "is not in conflict with the provisions and purposes of . . . [the] act."[4] According to *Zussman,* an eviction to achieve a condominium conversion is appropriate where it achieves a proper accommodation of the policies of the rent control statute with the policy of encouraging home ownership in the condominium form.[5] In *Zussman,* the landlord-developer borrowed $950,000 for construction and permanent financ-

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[19] *Id.* at 1016-17, 326 N.E.2d at 307.
[20] 96 S. Ct. 16 (1975).
[21] 1975 Mass. App. Ct. Adv. Sh. 91, 322 N.E.2d 183, *review denied,* 1975 Mass. Adv. Sh. 1281.
[22] *Id.* at 102, 322 N.E.2d at 187.
[23] 1975 Mass. Adv. Sh. 1281.

§16.9. [1] Acts of 1970, c. 842.
[2] 1975 Mass. Adv. Sh. 1269, 326 N.E.2d 876.
[3] 1974 Mass. Adv. Sh. 1109, 314 N.E.2d 118.
[4] Acts of 1970, c. 842, § 9(a)(10).
[5] 1975 Mass. Adv. Sh. at 1277-78, 326 N.E.2d at 879. *See* G.L. c. 183A.

ing, refurbished hallways, improved electrical systems, and modernized units as they became vacant.[6] He demonstrated his willingness to accomplish the conversion in a manner least likely to inconvenience the tenants, and offered each tenant a preferential opportunity to buy a unit in the condominium at a lower price than that offered to the public, including favorable financing and an offer to repurchase after two years at the same price if the purchaser was dissatisfied. He offered any tenant not desiring to purchase a full year to vacate.[7] The Court held that such a condominium conversion could not be prohibited under the rent control statute because it was "piecemeal, unit by unit."[8] Hence, a Brookline rent control board regulation that had the purpose and effect of preventing those conversions was held invalid.[9] The Court did assume, however, that a rent control board may impose reasonable regulations on such conversions.[10]

Mayo, where similar conversions were held permissibly prohibited by the Boston rent control administration,[11] was distinguished on the basis that the conversions in that case involved a removal of all the controlled rental units temporarily from the housing market in an attempt to upgrade them and then to reintroduce them into the housing market as condominiums for families with higher incomes.[12] The developer in *Mayo* made no attempt to offer the units to the former tenants so as to encourage their home ownership and left the apartments vacant during the conversion.[13] Although some of the "optional upgrading" that led the *Mayo* Court to prohibit the conversion was present in *Zussman*,[14] the steps that the developer took to minimize the inconvenience and dislocation of the tenants led the Court to conclude that the purpose of the conversion was not inconsistent with the goals of the rent control law.[15]

§16.10. Condominiums: Unit Restrictions. *Johnson v. Keith*,[1] decided during the *Survey* year, pinpoints a procedural pitfall in condominium management that can easily be avoided. In *Johnson*, the condominium had adopted and recorded by-laws providing that the Board of Managers could promulgate and amend rules and regula-

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[6] 1975 Mass. Adv. Sh. at 1271, 326 N.E.2d at 877.
[7] *Id.*
[8] *Id.* at 1276, 326 N.E.2d at 879.
[9] *Id.* at 1280, 326 N.E.2d at 880.
[10] *See id.* at 1279-80, 326 N.E.2d at 880.
[11] 1974 Mass. Adv. Sh. at 1114, 314 N.E.2d at 122.
[12] 1975 Mass. Adv. Sh. at 1276, 326 N.E.2d at 879; *see Mayo*, 1974 Mass. Adv. Sh. at 1115, 314 N.E.2d at 122.
[13] *See* 1974 Mass. Adv. Sh. at 1115, 314 N.E.2d at 122.
[14] 1975 Mass. Adv. Sh. at 1276, 326 N.E.2d at 879.
[15] *See id.*

§16.10. [1] 1975 Mass. Adv. Sh. 2269, 331 N.E.2d 879.

tions concerning the use of both the units and the common areas.[2] Although the by-laws recited that rules and regulations are "annexed hereto and made a part hereof, as Schedule A," no such schedule was included with the recorded by-laws.[3] The rules and regulations were recorded approximately eleven months later.[4] One of those rules prohibited the keeping of animals in condominium units.[5] The Court held that the rule was invalid[6] because, under the condominium statute, rules and regulations may govern the details of the use and operation of common areas and facilities but not individual units.[7] Although individual units may be regulated through by-law restrictions aimed at preventing unreasonable interference with the use of other units,[8] the Court refused to treat the rules and regulations as by-law provisions even though they were referred to and incorporated within the by-laws.[9] The Court's conclusion was predicated primarily on the different procedures prescribed for the amendment of by-laws and of rules and regulations.[10] Needless to say, this result should constitute only a temporary defeat for the other unit owners, in that they may be able to achieve their objective by merely amending the by-laws.

The result does highlight the necessity for an unambiguous treatment of the rules and regulations. It may be desirable to explicitly incorporate them by reference in the by-laws and to explicitly provide that they are to be treated, in all respects, as by-laws.

The Court also held that the enforcement of restrictions against the owner of a condominium unit is exempt from the "obsolete restrictions"[11] statute.[12] The Court concluded that because restrictions in the master deed and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions.[13] The Court also concluded that the statute of frauds does not bar enforcement of an otherwise lawful restriction against a unit owner who has not assented in writing to the restrictions.[14]

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[2] *Id.* at 2272 n.2, 331 N.E.2d at 881 n.2.
[3] *Id.* at 2272-73, 331 N.E.2d at 881.
[4] *Id.* at 2273, 331 N.E.2d at 881.
[5] *Id.* at 2269, 331 N.E.2d at 880.
[6] *Id.* at 2273, 331 N.E.2d at 881.
[7] G.L. c. 183A, § 11(d).
[8] *Id.* § 11(e).
[9] 1975 Mass. Adv. Sh. at 2273-74, 331 N.E.2d at 881-82.
[10] *Id.* at 2274, 331 N.E.2d at 882.
[11] G.L. c. 184, §§ 26-30. The obsolete restrictions statute generally requires that restrictions on the use of property be recorded and that they expire after thirty years (with certain exceptions) and limits the parties who can enforce those restrictions. *See id.*
[12] 1975 Mass. Adv. Sh. at 2276, 331 N.E.2d at 882.
[13] *Id.*
[14] *Id.* at 2276-77, 331 N.E.2d at 882-83. For an in depth discussion of the problems of condominium regulation, see Schwartz, *Property & Conveyancing*, 1963 ANN. SURV. MASS. LAW § 1.1-.6, at 3-18.

§16.11. Conveyances between Spouses. Until this year, the delivery of a deed between a husband and wife did not effectuate a transfer of title. Section 3 of chapter 209 of the General Laws provided that title did not pass until the deed was duly acknowledged and recorded. If the deed was not recorded until after the transferor spouse's death, the conveyance was a nullity.[1] Section 2 of chapter 558 of the Acts of 1975 amended section 3 of chapter 209 to provide that transfers between the spouses "shall be valid to the same extent as if they were sold." Hence, title will pass upon the delivery of the deed to the spouse.

§16.12. Public Housing. In *Harborview Residents' Committee, Inc. v. Quincy Housing Authority,*[1] decided during the *Survey* year, the Court treated the validity of regulations promulgated by the Department of Community Affairs regarding procedures to be followed when a local housing authority seeks to evict a tenant from governmentally subsidized, operated, and maintained housing. The regulations prevent a local housing authority from instituting summary process to terminate the lease until administrative conferences, hearings, and appeals have been exhausted.[2] The Court sustained the validity of the regulations, holding that they do not conflict with the requirement of section 32 of Chapter 121B of the General Laws that housing authorities operate "decent, safe and sanitary dwelling accommodations at lowest possible cost."[3] The Court reasoned that the mere fact that the regulation would entail administrative costs for conferences and hearings and a loss of revenue through the forced continuation of the leases of defaulting tenants was not violative of the policy embodied within the public housing statute.[4] In addition, the Court rejected the argument that another provision of section 32, which prescribes a procedure for termination,[5] preempted the field and precluded the Department of Community Affairs from establishing more rigid requirements.[6] The statutory procedure was viewed as merely setting a "floor" and not a "limit."[7] The Court concluded that the Legislature intended to permit the Department of Community Affairs to augment those procedures where necessary to protect the interests of tenants and the housing authorities.[8]

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§16.11. [1] Erickson v. White, 288 Mass. 451, 452, 193 N.E. 25, 26 (1934).

§16.12. [1] 1975 Mass. Adv. Sh. 2433, 332 N.E.2d 891.
[2] *Id.* at 2436-37, 332 N.E.2d at 893.
[3] 1975 Mass. Adv. Sh. at 2441, 322 N.E.2d at 894-95.
[4] *Id.*, 332 N.E.2d at 895, *citing* Commissioner of Dept. of Community Affairs v. Medford Housing Authority, 1973 Mass. Adv. Sh. 1017, 1024, 298 N.E.2d 862, 865.
[5] G.L. c. 121B, § 32.
[6] 1975 Mass. Adv. Sh. at 2442, 332 N.E.2d at 895.
[7] *Id.*
[8] *Id.*

In *Perez v. Boston Housing Authority,*[9] the Court was faced with a class action in which tenants sought to enjoin the Commonwealth from committing any of its remaining borrowing power for the development of low income housing until the preparation and state approval of rehabilitation plans for housing projects owned and operated by the Boston Housing Authority (which allegedly had committed sanitary code[10] violations on its premises).[11] The tenants also sought to compel the Commonwealth to provide, from the aforementioned funds remaining to be borrowed, the money necessary for rehabilitating the BHA housing once such plans were prepared and approved.[12] Evidently, the BHA had no financial resources of its own to do the necessary rehabilitation. The Court held that the Commonwealth was not subject to any such liability on the ground that section 127N of chapter 111, of the General Laws, which awards damages for housing code violations, did not extend damage liability to the Commonwealth, and hence the Court denied the requested relief.[13] At the same time, the Court's opinion contains a graphic description of the terrible realities of the BHA projects.[14] The opinion vividly describes the scope of the problem and should become a primer for legislative and executive action.

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[9] 1975 Mass. Adv. Sh. 2294, 331 N.E.2d 801.
[10] G.L. c. 111, § 127A.
[11] 1975 Mass. Adv. Sh. at 2296, 331 N.E.2d at 803.
[12] *Id.*
[13] 1975 Mass. Adv. Sh. at 2301-04, 331 N.E.2d at 805-06.
[14] *See id.* at 2306-09, 331 N.E.2d at 806-07.