

## CHAPTER 9

# Property

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§9.1. Regulation of payment of fees to banks' attorneys. Rather than recovering all of the costs of mortgage lending through the rate of interest charged, banks have traditionally required the borrower, insofar as possible, to pay the expenses involved. The bank may either provide or contract for the service and collect the cost from the borrower, or require the borrower to contract directly for the service. In the case of non-legal services such as termite inspections it makes little difference which way it is handled. With respect to attorneys' services, however, it does make a difference, at least in the usual situation where the attorney is expected to handle the entire transaction, and not simply to certify title. Except with respect to the title,<sup>1</sup> the interests of the bank and the borrower differ, and frequently conflict. The bank must have its own attorney to represent its interests in all aspects of the transaction.<sup>2</sup> The same attorney cannot also represent the borrower.<sup>3</sup> It is essential that the borrower understand this conflict of interest and that is why it makes a difference how it is handled. When the bank requires the borrower to pay the attorney's fee, the borrower inevitably assumes that the attorney represents his interests as well as the bank's. The fact that both bank and borrower erroneously think of the attorney's role solely

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§9.1. <sup>1</sup> Some attorneys are of the opinion that there is a conflict of interest even with respect to title because there are some title defects which will not make the property unsatisfactory security but which should concern a buyer. An example might be that a small unused portion of the property is derived through a low value tax title foreclosure, considered by some attorneys to be unmarketable. The author does not feel that this creates a problem since the attorney can, without conflict, advise both the bank and the buyer in such a situation. He can advise the bank of the facts and give his opinion that they will get satisfactory security and he can advise the buyer that he will not have a marketable title to a specified portion of the premises.

<sup>2</sup> Some of the matters other than title which concern the bank are: prepayment rights, compliance with various regulatory laws such as the Disclosure Law, late charge provisions, special mortgage provisions such as an adequately drafted alienation clause, insurance protection, proper execution of the note by the required people, collection of the correct tax escrow amount.

<sup>3</sup> ABA Code of Professional Responsibility, Disciplinary Rule 5-105(B) (1971) states: "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client. . . ."

as that of certifying title contributes to this misapprehension. The General Court has been concerned with this problem. In 1969 it required banks to print in large type on each mortgage application a warning intended to alert borrowers to the conflict.<sup>4</sup> In 1970 it further required that the banks, and not the attorneys, must actually bill the mortgagor.<sup>5</sup> These requirements did not solve the problem.

The only way this situation can be remedied is to have banks pay their own attorneys, but since this is strenuously opposed by both banks and attorneys, it is unlikely to happen. In recognition of this fact the General Court sought by Chapter 547 of the Acts of 1972<sup>6</sup> to eliminate one of the more serious aspects of the problem, which was that borrowers seldom got the protection of a title opinion in purchasing property. For the borrower to procure an independent title examination is a duplication of effort and an unnecessary expense, if the bank's attorney is competent and reliable. Therefore, if consulted, most attorneys would arrange with the bank's attorney to certify title also to the borrower for a suitable additional fee. However, some bank's attorneys took the position that to certify also to the borrower would constitute a conflict of interest.<sup>7</sup> In any event, few borrowers consulted an attorney and most bank's attorneys usually found themselves in an uncomfortable situation knowing that the borrower could not be expected to understand the subtle distinction between certifying title to the bank and certifying to the borrower.<sup>8</sup> Therefore, some attorneys would ask the borrower if he wanted to purchase an opinion. Others believed that such an inquiry would constitute an improper solicitation of business.<sup>9</sup>

Chapter 547 now provides that if the fee of the bank's attorney is paid by the borrower, the attorney must give the borrower a copy of

<sup>4</sup> Acts of 1969, c. 423 adding G.L., c. 184, §17B, as amended by Acts of 1972, c. 547, §2. The required language is:

1. The responsibility of the attorney for the mortgagee is to protect the interest of the mortgagee.

2. The mortgagor may, at his own expense, engage an attorney of his own selection to represent his own interests in the transaction.

<sup>5</sup> Acts of 1970, c. 824 amending G.L., c. 184, §17B. This requirement was deleted from the section by Acts of 1972, c. 547, §2.

<sup>6</sup> Adding G.L., c. 93, §70.

<sup>7</sup> See note 3, *supra*.

<sup>8</sup> It should be said that some bank officers do not fully understand or appreciate the consequences of the distinction. When a defect is discovered the buyer invariably goes to the bank and the bank turns to the attorney and expects him to correct the defect even though the bank has suffered no loss. If it is a serious matter the attorney may have to absorb a substantial loss in order to retain the bank's good will. His insurance will not cover him because he did not certify to the buyer and insurance covers only legal liability.

<sup>9</sup> ABA Code of Professional Responsibility, Disciplinary Rule 2-103(A) (1971) states: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or an associate to a non-lawyer who has not sought his advice regarding employment of a lawyer. . . ."

his certification of title, which shall be deemed to have been rendered also to the borrower.<sup>10</sup>

While Chapter 547 represents an improvement, its protection for the borrower is far from complete. The draftsmen faced a dilemma. Charges for certifying title are customarily and properly based on the amount of the attorney's exposure to liability for a faulty certification.<sup>11</sup> In certifying to a bank, the attorney's exposure is the amount of the mortgage, which declines as payments are made on principal and is reduced to nothing at the end of the term. In certifying to a buyer, the attorney's exposure is the full value of the property and the amount of exposure does not decline. Consequently the charge for certifying to a buyer will be more than the charge for certifying to the bank. This problem was resolved by providing that the lawyer's exposure to the buyer will be the same as to the bank.<sup>12</sup> This means, of course, that the buyer will not get the protection he should have and the situation will remain confusing to the buyer and difficult for the attorney who must now take pains to explain to the buyer that the statutory certification does not provide full protection. The situation is therefore still unsatisfactory.

The only really adequate solution would be to have the bank's attorney give the buyer an unrestricted certification and charge on the basis of the purchase price unless the buyer elects in writing to take only the limited protection provided by the statute. Both banks and their attorneys would be wise to adopt this procedure.<sup>13</sup> Unfortunately this solution is unlikely to be adopted on a strictly voluntary basis because banks compete not only with respect to interest rates but also with respect to attorney's fee schedules. Possibly this reform could be brought about by the Savings Bank Association working in association with Conveyancers Association.

<sup>10</sup> Chapter 547 applies only in the case of 1 to 4 family property to be occupied in whole or part by the borrower.

<sup>11</sup> *Dorr v. Massachusetts Title Ins. Co.*, 238 Mass. 490, 495, 131 N.E. 191, 192 (1921). Liability and damages for a faulty title are based on a theory of negligence.

<sup>12</sup> Acts of 1972, c. 547, §1, adding G.L., c. 93, §70, provides in part: "such certification shall be deemed to have been rendered for the benefit of the mortgagor to the same extent as it is for the mortgagee." While this language is not free from ambiguity, it can be assumed that the interpretation in the text was the intended meaning and it is universally accepted by conveyancers.

<sup>13</sup> The bank and the attorney would not find themselves in the uncomfortable position of having to tell the borrower that he does not have full protection and cannot legally hold the attorney beyond his liability to the bank. From the attorney's viewpoint the proposed solution has even greater benefits. He would get a bit more for his original services and in most cases there would be no increase in the time or expense he would be likely to have to spend in the event of a defect. In either case he will have to do what is necessary to cure the defect. In the case of a serious defect which cannot be cured, his insurance would cover him fully, which it would not do in cases where he has not given a full certification; and in cases where the borrower has elected in writing to take only the limited statutory coverage he will be under no pressure to pay more than the amount then due on the mortgage, which will be covered by his insurance.

Banks' attorneys should consider the following matters in working out their procedure for complying with the statute:

1. It would seem advisable to make reference to the limitation on the buyer's protection in some document signed by him, preferably the certification itself.<sup>14</sup>

2. The attorney must be careful to make reference, either in his certification or in the mortgage, to all encumbrances and other matters which might affect the use or enjoyment of the premises even if they are not material to the bank's satisfactory security.

3. The attorney would be wise to specify (by an attached schedule) those matters which his search does not cover.

**§9.2. Restrictions: Common scheme.** When a developer lays out a subdivision and imposes identical restrictions on each lot he creates a common development scheme. The implied intention of such a scheme is that each lot shall be burdened by the same restrictions. Unless the developer reserves the right of enforcement to himself or an owners association, the benefit is appurtenant to each lot in the scheme and each lot owner can enforce the restrictions against any other lot in the scheme.<sup>1</sup>

What happens, then, if the developer fails to impose the restrictions in his deed of one or more lots? This may be evidence against the existence of a general scheme, but it is not conclusive.<sup>2</sup> Obviously, once a scheme has been established, the expectations of the early purchasers cannot be defeated merely by the later acts or omissions of the developer. Nevertheless, the developer may deed out lots which are part of a common scheme, and which the early purchasers rightly expect to be restricted for their benefit, but without stating the restriction in the deed. Can the common scheme restrictions be enforced against such

<sup>14</sup> A suggested form is reproduced below:

A copy of this certificate is given to the Mortgagor pursuant to the requirements of Chapter 547 of the Acts of 1972, and liability for error or omission is limited to the parties named herein and to the existing unpaid principal balance until the discharge or foreclosure of said mortgage. The Mortgagor hereby acknowledges receipt of a copy of this certificate and of a copy of the Note and of the Mortgage.

Date: \_\_\_\_\_

\_\_\_\_\_  
Mortgagor

§9.2. <sup>1</sup> *Canty v. Donovan*, 1972 Mass. Adv. Sh. 784, 281 N.E.2d 611 and cases cited therein. See also Comment, *Equitable Servitudes—Theories of Enforcement—Evidence Needed to Establish*, 44 B.U.L. Rev. 231: "The function of a common building scheme in the enforcement of equitable servitudes is threefold: (1) it serves a notice function in that purchasers who are aware of a recorded plat or the nature of a scheme cannot plead immunity from the restrictions there imposed; (2) it permits enforcement of servitudes by a prior grantee against a subsequent grantee in jurisdictions [not including Massachusetts] where implied mutual covenants are said to arise when the grantor imposes restrictions on the grantee; and (3) it may be used as evidence of whether the covenants were intended to be personal to the grantor or for the benefit of all grantees in the scheme." *Id.* at 237-38.

<sup>2</sup> *Id.*

owners? There are two possible hurdles: the statute of frauds and the recording act. To answer the question we must know one further fact: whether one or more of the deeds which did contain restrictions also contained a reciprocal provision to the effect that all the other lots in the scheme would be similarly restricted. If so, the restrictions can be enforced against all the lots. If not, they cannot be enforced against lots which are not specifically restricted because, under Massachusetts law, the statute of frauds prevents enforcement.<sup>3</sup>

Within this context, the Supreme Judicial Court this year decided *Houghton v. Rizzo*.<sup>4</sup> After selling most of the lots in his subdivision subject to identical restrictions against other than single family residences, the developer commenced construction of an apartment building on a remaining lot and the irate purchasers of restricted lots sought an injunction. The plaintiffs argued that the facts established a common scheme to restrict all of the land within the development, and that the developer's remaining land should therefore be bound by similar restrictions "by way of implication."<sup>5</sup> Since none of the deeds specifically provided that all the lots would be restricted, the Court held that the statute of frauds barred relief.<sup>6</sup> Although this rule is well settled in Massachusetts the Court undertook a thorough review of the law. In so doing we may presume that the Court was influenced by the fact that the law is otherwise in some jurisdictions<sup>7</sup> and also by the inclination of modern courts to relax technical rules of law to avoid inequities, especially in cases where the average man cannot realistically be expected always to consult an attorney.<sup>8</sup> The Court confirmed the existing law, but it did not review the *applicability* of the statute of frauds. Instead, it based its decision on the fact that land titles would be adversely affected if the statute of frauds were held not to bar relief.<sup>9</sup> The Court should be

<sup>3</sup> *Sprague v. Kimball*, 213 Mass. 380, 100 N.E. 622 (1913); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); and *Frank v. Visockas*, 356 Mass. 227, 249 N.E.2d 1 (1969). See also Dellheim, "Introductory Commentary," appearing in M.G.L.A., c. 184.

<sup>4</sup> 1972 Mass. Adv. Sh. 829, 281 N.E.2d 577.

<sup>5</sup> *Id.* at 833, 281 N.E.2d at 580.

<sup>6</sup> *Id.* at 835, 281 N.E.2d at 581.

<sup>7</sup> England and a minority of U.S. jurisdictions. The Michigan Supreme Court has stated the minority rule as follows:

If the owner of two or more lots, so situated to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and . . . the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. *Sanborn v. McLean*, 233 Mich. 227, 229-30, 206 N.W. 496, 497 (1925).

Such restrictions are not personal to the owners, but rather they are "operative upon the use of the land by any owner having actual or constructive notice thereof." *Id.* at 230, 206 N.W. at 497.

<sup>8</sup> An example of this situation might be the purchase of a house. See in this connection the comment on the relation between the attorney for a mortgagee bank and the mortgagor, §9.1. *supra*.

<sup>9</sup> "It is the policy of our law in regard to the recording of deeds, that persons

commended for its concern with the reliability of land titles. Under today's conditions it is essential that real estate may be bought and sold quickly and at reasonable cost. Any rule of law which unduly complicates the process of title examination is therefore highly undesirable. If a developer's remaining land were subject to the common restrictions merely by implication, purchasers of real estate would be subject to a nearly impossible burden. In examining a title it would be necessary to determine: (1) whether the locus was ever part of a development; (2) whether any of the deeds of the developer contained restrictions; (3) whether, under all the facts, there was a common scheme giving rise to the implication that the entire development was similarly restricted; and (4) whether the locus was included in the scheme. It may be noted that a good part of this work is required in any event. The careful title examiner must inspect every deed by every grantor in the chain of title made during his ownership and prior to his grant of the locus in order to determine what encumbrances he may have imposed on his remaining land (which includes the locus).<sup>10</sup> Such encumbrances may include easements (including easements by implication or necessity) as well as restrictions or agreements to restrict. Since each deed out must be examined in any event, adoption of the English rule, which imposes restrictions on all of the land within the common scheme, would not increase the *scope* of title examinations. It would, nevertheless, greatly increase the examiner's *burden* by requiring a judgment as to whether the facts of record created a common scheme which included the locus. The existence and extent of a common scheme depend on an extensive case law not always consistent or easy of application.<sup>11</sup> To impose on title examiners the burden of making such judgments is not consistent with expeditious and inexpensive transferability of land.

In *Houghton*, the plaintiff sought to enforce implied restrictions, not against a subsequent owner, but against the developer himself. Accord-

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desiring to buy may safely trust the record as to the ownership of land, and as to encumbrances upon it which are created by deed.' " 1972 Mass. Adv. Sh. at 837, 281 N.E.2d at 582, quoting *McCusker v. Goode*, 195 Mass. 607, 611, 71 N.E. 76, 77-78 (1904).

<sup>10</sup> See CROCKER, *NOTES ON COMMON FORMS*, 557 (7th Ed., 1955); *Beekman v. Schirmer*, 239 Mass. 265, 132 N.E. 45 (1921).

<sup>11</sup> See for example, *Patrone v. Falcone*, 345 Mass. 659, 189 N.E.2d 228 (1963) and Comment, *Equitable Servitudes—Theories of Enforcement—Evidence Needed to Establish*, 44 B.U.L. Rev. 231: "No specific formula is required to establish an enforceable right; preliminary statements of an intention to restrict the tract, a factual observation of the nature and use of the land or the character of homes in a development; the acts and conduct of a common grantor; a plan recorded with or without restrictions; a substantial uniformity of the restrictions imposed on other lots in the alleged scheme; and words of the deed such as 'the grantor binds the remaining lots in the scheme'; all of which evidentiary factors form the framework of the body of evidence which is considered to determine the existence of a common building scheme under the Massachusetts and majority view." *Id.* at 239.

ingly, the title examination problem was not directly involved, but only the statute of frauds. The Court assumed that if land is subject to the restrictions in the hands of the developer it will necessarily be restricted in the hands of any subsequent owners. It is suggested that this need not be so. The question is one of notice under the recording act and only subsequent purchasers with actual or constructive notice should be bound. Admittedly, the general rule, applied in Massachusetts, is that a grantee is charged with constructive notice of every interest affecting his land which could be discovered by an examination of the land records,<sup>12</sup> including restrictions in the deeds of other grantees from a common grantor. It is also true that all the facts necessary to discover such restrictions or a common scheme will be on record.<sup>13</sup> Some courts in other jurisdictions have modified the rule to hold that a purchaser is not charged with constructive notice of facts which he could not learn of within the scope of a *reasonable* examination. In *Glorieux v. Lighthipe*,<sup>14</sup> for example, the Supreme Court of New Jersey held that a grantee of A's remaining land is not charged with notice of a prior deed of A because the prior deed was not within the chain of title.<sup>15</sup> It is submitted that this case goes too far because it does not consider the interests of the grantee of A's first deed. A fair and just rule must balance the equities between the two innocent parties. If A's first grantee has required that his expected rights respecting A's remaining land be set forth clearly in the deed he received, he has done all that he can to protect his rights and to give notice to subsequent grantees from A. These grantees can discover A's first deed and thereby learn of the restriction of the land they are purchasing. Although this imposes a substantial burden on subsequent purchasers from A, this burden has to be accepted. By contrast, where the first grantee fails to see that his expectation is included in his deed he has not done all that he can to protect himself and to give notice to subsequent purchasers from A. If these subsequent purchasers are required to examine for a common scheme and determine whether, on the facts discovered, a court would hold that a common scheme was created, they face a truly unreasonable burden. In this case, the equities clearly favor the subsequent purchaser and he should not be charged with notice. It is submitted that the time has come to apply a rule of reason and equity with respect to notice. The Court says as much

<sup>12</sup> *Baker v. Seneca*, 329 Mass. 736, 739, 110 N.E.2d 325, 327 (1953), citing *Hano v. Bigelow*, 155 Mass. 341, 344, 29 N.E. 628, 629 (1892).

<sup>13</sup> Deeds and plans must be filed at the registry of deeds for the district in which the property is situated to be valid, except as against the grantor or persons with actual notice. G.L., c. 183, §4.

<sup>14</sup> 88 N.J.L. 199, 96 A. 94 (1915).

<sup>15</sup> The New Jersey recording act imposed constructive notice only upon "subsequent purchasers." The court construed the term narrowly to include only purchasers of same land and not other purchasers from the common grantor. *Id.* at 201, 96 A. 95.

in *Houghton*,<sup>16</sup> but it achieves the result indirectly by a questionable application of the statute of frauds instead of by redefining the doctrine of notice. This is unfortunate as there may be other situations to which this rule should be applied.<sup>17</sup> More importantly the adoption of a rule based on notice would have permitted the Court to consider the statute of frauds issue on its own merits. Enforcement of common scheme restrictions against the developer would not subvert the policy of the statute since the facts which prove a common scheme are all in written records, plans and deeds. Courts and commentators have differed widely as to whether restrictions are enforced as contracts or as property interests.<sup>18</sup> Presumably Massachusetts has adopted the property theory because it is the property sections of the statute of frauds that account for *Sprague* and *Houghton*.<sup>19</sup> However, as pointed out by Ryckman,<sup>20</sup> our court has enforced express covenants in a suit by a grantor against a grantee even though the covenants were not signed by the party charged, as required by the statute of frauds.<sup>21</sup> Grantees seldom sign deeds. Conversely, a common scheme is proved by deeds signed by the developer, who is the party to be charged.

**§9.3. Easement, use by motor vehicles.** A right of way over a "cart-way" can be used by motor vehicles.<sup>1</sup> A way for "teams only" cannot.<sup>2</sup> The distinction is between a grant using general or unrestrictive language and one employing restrictive language. If granted by unrestrictive language an easement is available for all reasonable uses notwithstanding the original use. Thus motor vehicles may use "the privilege of a cart road"<sup>3</sup> and an easement to "pass . . . with teams."<sup>4</sup>

<sup>16</sup> "We elect not to add another dilemma to the many which are already faced by conveyancers in determining and evaluating title to real estate as affected by matters not of record." 1972 Mass. Adv. Sh. at 837, 281 N.E.2d at 582. Presumably, by "matters not of record" the Court meant matters not made explicit on the record. As pointed out above the facts which are evidence of a common scheme are of record.

<sup>17</sup> For instance, easements by implication or necessity.

<sup>18</sup> See Ryckman, Notice and the "Deeds out" problems, 64 Mich. L. Rev. 421 (1966), cited in *Houghton* which questions the application of the statute of frauds in *Sprague*.

<sup>19</sup> See also *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 246, 117 N.E. 244, 245 (1917) where the Court, after a thorough review of precedent, concluded: ". . . an equitable restriction is a property right in the person in favor of whose estate it runs or to which it is appurtenant."

<sup>20</sup> See footnote 31 on page 428 of Ryckmann, *supra*, which is also quoted in *Houghton*, 1972 Mass. Adv. Sh. at 836 n.3, 281 N.E.2d at 582 n.3.

<sup>21</sup> See, for example, *Canty v. Donovan*, 1972 Mass. Adv. Sh. 784, 281 N.E.2d 611, a suit by one purchaser in a restricted development against another, whose deed contained the restrictions, but who presumably did not sign his deed.

§9.3. 1 *Marden v. Mallard DeCoy Club, Inc.*, 1972 Mass. Adv. Sh. 235, 278 N.E.2d 743.

2 *Clarkin v. Duggan*, 292 Mass. 263, 198 N.E. 170 (1935).

3 *Hodgkins v. Bianchini*, 323 Mass. 169, 80 N.E.2d 464.

4 *Copp v. Foster*, 345 Mass. 777, 189 N.E.2d 521 (1963). For a more extended



to speculate on the possible effects of denying injunctive relief. The Chief Justice stated that the defendants did not claim any property interest in the plaintiffs' land. While it is doubtless true that neither they nor their predecessors in title intended to acquire any property interest, the denial of injunctive relief would have that result. By *res judicata* the plaintiffs would be barred from any action to compel removal.<sup>10</sup> Assume that the encroachment remained for twenty years and was then destroyed by fire or became dilapidated. Unless the land were registered, the encroacher would have acquired at least an easement by adverse possession and would then be entitled to rebuild on his neighbor's land. Under our law the encroacher's state of mind is immaterial.<sup>11</sup> In addition, a rule of law which allowed encroachments to stand might create serious zoning problems for both parties. Both lots would violate the side yard requirement. The Supreme Judicial Court has no power to grant any variance or exception.<sup>12</sup> To make matters worse, the encroacher's rights would not be of record and future purchasers of the encroached land might assume, as did the plaintiffs in *Peters*, that the line was between the houses. They would thus not be aware of the zoning violation. Such purchasers might further assume, as the plaintiffs probably did also, that their lot extended fifty feet from the presumed boundary, which might lead to further serious difficulties. The Chief Justice may reply that such persons should have their land surveyed to determine where their boundaries are, but this suggestion is far more pertinent to the person who built the encroaching house and caused the problem. This is the crux of the matter. Once a house is improperly placed a train of unfortunate and unforeseeable consequences will follow. The decision in *Peters* may, as the Chief Justice points out, constitute a windfall for the plaintiffs and a disaster for the defendants, but it will also serve to protect the public by emphasizing the importance of surveying land before building houses. This is a recurring problem of no small magnitude and concern throughout the state.<sup>13</sup>

Another serious consequence of following the Chief Justice's opinion would be the resulting lack of certainty in property titles since every encroachment would require a balancing of equities by a court. Certainty is an important matter when rights in real property are involved.

The Court based its decision, to an uncertain degree, upon the fact that

<sup>10</sup> One is said to acquire title when the former owner is barred by adverse possession from bringing action for eviction.

<sup>11</sup> *Van Allen v. Sweet*, 239 Mass. 571, 132 N.E. 348 (1921).

<sup>12</sup> Only the local Board of Appeals has that power, G.L., c. 40A, §15; and it is at least doubtful whether a variance would meet the standards of the statute, at least with respect to the encroacher.

<sup>13</sup> While houses are seldom so incorrectly placed as to encroach on a neighbor's land, an error sufficient to violate the zoning law, usually the side line requirement, is very common. The incorrect placing of the first house on a street in a subdivision has, in many cases, resulted in every house on the street violating the zoning law.

the plaintiffs' land was registered. It is unfortunate that it did so because, on the basis of prior decisions, the result should have been the same had the land been unregistered. The consequence is that the bar may be led to believe that, on facts such as *Peters*, but involving unregistered land, a mandatory decree might not be granted. Furthermore, in the opinion of the writer, the fact that the land was registered is irrelevant. The registration act in no way guarantees that one cannot lose rights in registered land by court action.<sup>14</sup> It seems equally clear that one is not shielded from negative court action. In other words, the owner of registered land has no right to compel a court to give him specific relief which the court would not give an owner of unregistered land. By basing its decision in part on the fact that the land was registered the Court has unfortunately muddled the law respecting registered land.

**§9.5. Statute of Frauds.** Doing business by telephone involves a number of hazards, including the statute of frauds. In *Walsh v. Slater*<sup>1</sup> two attorneys made an oral agreement to renew their lease at an increased rental and were informed by the landlord that a written renewal was being prepared. In reliance on this agreement they abandoned search for other space and paid the increased rental. This reliance was not sufficient part performance to avoid the statute of frauds. Accordingly the Court dismissed the attorneys' suit for specific enforcement of the oral agreement.

**§9.6. Mortgage foreclosure: Notice to second mortgagee.** To protect his investment a second mortgagee must attend the first mortgage foreclosure sale even if the value of the property is sufficient to cover both mortgages. If he does not attend and bid, the mortgaged property may be sold for less than its value, and the mere inadequacy of the selling price will not entitle the second mortgagee to set aside the sale.<sup>1</sup> Since the foreclosure statute requires no notice other than by publication,<sup>2</sup> the risk assumed by junior mortgagees is that the property may be sold without their knowledge. Thus, when they are aware of a delinquency on the mortgage, junior mortgagees may request the senior mortgagee to give them personal notice of a foreclosure sale. However, the Court held in *Sher v. South Shore National Bank*<sup>3</sup> that a senior mortgagee, in spite of such a request, has no duty to do so.

<sup>14</sup> Certainly specific performance can be had against an owner of registered land. See also *State Street Bank & Trust Co. v. Beale*, 353 Mass. 103, 227 N.E.2d 924 (1967), in which the owner of registered land, who acquired the ownership through a fraudulent registration, was ordered to convey to the person who was the owner prior to the fraudulent registration.

§9.5. <sup>1</sup> 1972 Mass. Adv. Sh. 780, 281 N.E.2d 615.

§9.6. <sup>1</sup> *King v. Bronson*, 122 Mass. 122 (1877); *Wing v. Hayford*, 124 Mass. 249 (1878); *Freedman v. Peoples Nat. Bank of Marlborough*, 291 Mass. 168, 196 N.E. 846 (1935).

<sup>2</sup> G.L., c. 244, §14.

<sup>3</sup> 1971 Mass. Adv. Sh. 1565, 274 N.E.2d 792.

In *Sher*, the plaintiff was a second mortgagee who had sent the first mortgagee a check to cover a deficiency on the first mortgage. The letter of transmittal which accompanied the check requested personal notice "[i]n the event that you occasion any problems whatsoever in connection with the first mortgage . . ."<sup>4</sup> Defendant's attorney returned plaintiff's check with the explanation that his client had instructed him to foreclose on the mortgage. Defendant then complied with the statutory notice requirement and sold the property, but he never informed plaintiff of the time or place of the sale.

A first mortgagee and its attorney must exercise care in their dealings with the junior mortgagee.<sup>5</sup> If the first mortgagee or its attorney has actually agreed to notify a junior mortgagee and fails to do so, this will be evidence of bad faith and the sale may be set aside.<sup>6</sup> Plaintiff in *Sher* argued that the correspondence between the parties constituted such an agreement, but the court did not agree.<sup>7</sup> Nevertheless, the first mortgagee would be well advised always to give written notice to junior mortgagees and to all other persons who may have an interest in the property regardless of whether he has agreed to do so. He may thus foreclose any claim of bad faith, and in any case he should be anxious to have others bid at the sale. Banks want to have their loans paid, and they are not desirous of owning real estate.

**§9.7. First refusal in lease.** Can a landlord agree during the term of a lease to sell *after* its termination without giving the tenant the right to purchase under an ambiguously worded first refusal clause in the lease? The answer is yes, at least in the case of residential property.

The dispute in *Seward v. Weeks*<sup>1</sup> concerned a lease which gave lessee a first refusal "[i]n the event of a contemplated sale during the demised term. . ."<sup>2</sup> (Court's emphasis). The lessor had contemplated the sale during the demised term, but he terminated the lease before he actually sold the property. The question presented was whether the mere *con-*

<sup>4</sup> Id. at 1566, 274 N.E.2d at 793.

<sup>5</sup> *Chartrand v. Newton Trust Co.*, 296 Mass. 317, 320, 5 N.E.2d 421, 423 (1936); *Des Lauries v. Shea*, 300 Mass. 30, 34-36, 13 N.E.2d 932, 935 (1938); *West Roxbury Co-op. Bank v. Bowser*, 324 Mass. 489, 492, 87 N.E.2d 113, 115 (1949).

<sup>6</sup> See, e.g., *Clapp v. Garner*, 237 Mass. 187, 130 N.E. 47 (1921): the Court invalidated a mortgage foreclosure sale where the master had found that 1) defendant knew that plaintiff would expect personal notification, 2) plaintiff was misled by the failure to notify, 3) defendant's failure to notify was intentional, and 4) defendant's purpose was to get the property at less than its value. Id. at 190, 130 N.E. at 48. Although disparity between the price obtained and the true value alone is not sufficient to warrant a finding that the sale was conducted fraudulently, it may be considered in connection with other evidence to support a finding of fraud. *Sandler v. Silk*, 292 Mass. at 497, 198 N.E. at 751 (1935).

<sup>7</sup> 1971 Mass. Adv. Sh. 1565, 1567, 274 N.E.2d 792, 794.

§9.7. <sup>1</sup> 1971 Mass. Adv. Sh. 1575, 274 N.E.2d 813.

<sup>2</sup> Id.

*templation* of sale would entitle the lessee to his right of first refusal. The Court held that it would not:

Nothing in their use of the locus shows special necessity of continuing that use after the end of the lease which might give occasion for thinking that the parties intended to give a special meaning to the crucial words of the first refusal article.<sup>3</sup>

If mere contemplation of sale were to be the basis for a first refusal, it would be necessary to know when the tenant could exercise his right, and what degree of determination to sell would be required. The Court in *Seward* was influenced by the fact that these questions were not covered in the lease.<sup>4</sup> The absence of such specifics will not be fatal if the first refusal right is clearly based on the decision to sell rather than contemplation of sale.<sup>5</sup> Nevertheless, these points should be clearly covered in the lease to protect the tenant's purchase option.

**§9.8. Jurisdiction of nonresident.** How does a wife collect alimony when the husband has left the state? If they owned their home jointly they become tenants in common upon divorce and the husband's interest may be applied by a quasi in rem decree. In *Blitzer v. Blitzer*<sup>1</sup> the Court sets forth in detail the correct way to do so, emphasizing that a decree ordering the nonresident husband to convey his interest to the wife will fail because the probate court lacks personal jurisdiction over him.

**§9.9. Tax taking: Notice to mortgagee.** Before taking real estate for nonpayment of taxes, the collector must publish and post notices which "shall contain . . . the names of all owners known to the collector."<sup>1</sup> In *Vee Jay Realty Trust Co. v. Di Croce*<sup>2</sup> the novel claim was made that the name of the mortgagee must be included because he has legal title to the property. The Court, however, was not persuaded.

<sup>3</sup> Id. at 1580, 274 N.E.2d at 816.

<sup>4</sup> Id. at 1579-80, 274 N.E.2d at 816.

<sup>5</sup> See, e.g., *Chandler & Co., Inc. v. McDonald-Weber Co.*, 215 Mass. 365, 366, 102 N.E. 319 (1913), where it was agreed, if the owner "decides to sell . . . , it will first notify the [other] party . . . and give it an opportunity to purchase. . . ."

§9.8. <sup>1</sup> 1972 Mass. Adv. Sh. 985, 282 N.E.2d 918.

§9.9. <sup>1</sup> G.L., c. 60, §40.

<sup>2</sup> 1972 Mass. Adv. Sh. 59, 277 N.E.2d 690.