PART I

# Private Law

## CHAPTER 1

## Property and Conveyancing

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**§1.1. Restraints on alienation.** Restraints on the alienation of legal interests have generally not been favored by the courts. Among the evils growing out of such restraints are that they may take property out of commerce and may lead to an undesirable increase in the market value of property. Even more significant are the objections that they tend to concentrate wealth and discourage improvements.[1] In addition, to the extent that a restraint precludes creditors from reaching the property, such a restraint appears to be immoral since it permits a debtor to enjoy his property without paying his creditors.[2]

In *Bowen v. Campbell*,[3] the Supreme Judicial Court has indicated that it looks upon restraints on alienation with disfavor. Unfortunately, however, it failed to indicate precisely the extent to which such restraints may be invalid. The facts of the case are as follows. A testatrix, who died in 1918, devised land "in equal shares to the six grandchildren of Simeon Bowen [the testatrix's father] . . . absolutely, . . . Subject to this condition that neither of said grandchildren or his or her heirs shall during the life . . . of any said grandchildren . . . or during the further period of lives in being of the children of any said grandchildren . . . at the time of the probate of this will, alien . . . his, her, or their interest . . . except to some other or others of the grandchildren . . . or their heirs. It being my intention that said real estate shall be retained by said grandchildren

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§1.1. [1] Schnelby, Restraints upon the Alienation of Property, 6 American Law of Property §26.3 (Casner ed. 1952).

[2] Gray, Restraints on the Alienation of Property §§258, 262, 264 (2d ed. 1895); 4 Restatement of Property §405, Comment *a*.

[3] 1962 Mass. Adv. Sh. 427, 181 N.E.2d 342, also noted in §2.10 *infra*.

. . . and their . . . heirs so long as . . . may be permitted by the laws of . . . Massachusetts." Of the six grandchildren alive in 1918, one died about 1920 without issue leaving a widow "whose whereabouts are now unknown." Three grandchildren are now alive. Two grandchildren are dead, each leaving a son, now living. All of the six grandchildren and the two great-grandchildren were alive at the testatrix's death. The now living grandchildren and great-grandchildren sought declaratory relief in an effort to sell the land to a person not included within the permissible list of grantees. The residuary devisees contended that the invalidity of the restraint resulted in the devise failing (and thus the land passed to them through the residue clause). Thus both parties evidently contended that the restraint was void. They differed, however, in their interpretation of the consequences of invalidity.

Despite the fact that neither party argued for the validity of the restraint, the Court devoted most of its opinion to a discussion of this point. It raised, but did not decide, the issue as to whether the restraint was invalid because it was limited unreasonably as to the number of permissible transferees. The American authorities, except possibly Kentucky, are opposed to the validity of restraints of this kind.[4] A restraint which allows alienation only to a small group is almost as objectionable as a complete restraint since a transfer of the property is not likely to occur.[5] Rather than resting its decision upon this basis, the Court then proceeded to invalidate the restraint on the grounds that the restraint might extend beyond the perpetuities period. One may justifiably read an inference into the opinion that a restraint which was limited to the perpetuities period might be valid. Yet such a result appears to be contrary to the rule adopted everywhere (with the possible exception of Indiana) that a disabling restraint is void even though it is qualified as to duration.[6] The restraint in *Bowen* appears to be of the disabling type. In the course of its discussion, the Court cited *Roberts v. Jones*.[7] This case involved the issue of a restraint on partition. Such restraints, unlike other restraints on alienation, are valid if they are for a reasonable time.[8]

In concluding that this restraint was void on the ground that it might extend for an unreasonably long time, the Court adopted the perpetuities period by analogy as the maximum permissible period of duration. Viewed as of the testatrix's death, the Court stated that the restraint might last beyond the perpetuities period since all of the grandchildren then living might be dead by the time of the probate of the will and there might be great-grandchildren living on the date of such probate who were not alive at her death. The probate of the

4 Schnelby, *supra* note 1, at §26.32.
5 Ibid.
6 Id. §26.24.
7 307 Mass. 504, 30 N.E.2d 392 (1940).
8 See Newhall, Future Interests in Massachusetts §52 (3d ed. 1951). This is usually construed to be the perpetuities period. See Schnelby, *supra* note 1, at §26.74.

will, which was specified as the time for ascertaining the measuring lives, might (viewed as of the testatrix's death) have occurred a considerable period of time after the testatrix's death.

Although the Court borrowed the perpetuities period by analogy, it failed to explain adequately why certain other rules applicable to the rule against perpetuities should not be also borrowed by analogy. Thus the restraint could have been sustained by construing "probate" as an inadvertence and as really meaning "the time of my death." [9] In addition, although the will went into effect before the "second look" statute was adopted,[10] the Court failed to take cognizance of the possibility of judicially applying a "second look" principle to pre-1955 disposition.[11] Although there is no prior life estate in this disposition, which appears to be a prerequisite to the taking of a "second look" under the statute, the Court could plausibly have permitted the taking of a "second look" at the date of probate. This would have validated the restraint since the will was in fact allowed five months after the testatrix's death and all of the grandchildren and the two great-grandchildren were in fact alive at the testatrix's death. Finally, the Court offers no explanation as to why the final clause of the devise, which provided that "said real estate shall be retained . . . so long as . . . permitted by the laws of Massachusetts," should not be construed as a saving clause which validated the restraint by limiting its duration to the perpetuities period.

The Court held that the invalidity of the restraint did not affect the validity of the devise. The devisees were thus permitted to hold the property free of restraint. This result appears to be universally accepted.[12]

**§1.2. Real estate tax exemptions.** Clause Seventeen of G.L., c. 59, §5, provides for an exemption of "real estate, to the value of two thousand dollars, of a widow, or of any minor whose father is deceased, occupied by such widow, or minor as her or his domicile . . ."

In *Sylvester v. Assessors of Braintree*,[1] the issue was presented as to whether each of three minor co-owners is entitled to an exemption of $2000, making a total exemption of $6000. The widowed mother of the minors involved had taken title to the premises on October 16, 1958, and had conveyed the property without consideration to her three minor children in November, 1958. The Supreme Judicial Court resolved the issue in favor of the local taxing authorities. In reaching this result, the Court stressed the fact that the taxpayer who claims the

[9] Cf. Belfield v. Booth, 63 Conn. 299, 27 Atl. 585 (1893).

[10] G.L., c. 184A.

[11] Tudor, The Impact of Recent Statutory Adoption of the Wait and See Principle on the Common Law Rule Against Perpetuities, 38 B.U.L. Rev. 41 (1957); Cohen, The Rule Against Accumulations and Wait & See, 33 Temp. L.Q. 34 (1955). See Merchants National Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953). See also Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co., 335 Mass. 407, 417, 140 N.E.2d 201, 209 (1957).

[12] See Schnelby, *supra* note 1, at §26.83.

§1.2. [1] 1962 Mass. Adv. Sh. 693, 182 N.E.2d 120.

benefit of an exemption has the burden of proving the existence and scope of the exemption. It also noted that the clause had been amended in 1935 by striking out the words "whether such property be owned by such persons separately, or jointly, or as tenants in common." It also drew a negative inference from the failure of the legislature specifically to grant more than one exemption as it has done in other areas, such as the exemption for soldiers and sailors. Thus the Court, in limiting the exemptions to one for the real estate, regardless of how many minor co-owners are domiciled there, closes the door to this potential tax savings device. Although in all likelihood a similar result will be reached when a widow owns and occupies property jointly with a minor, it can be contended that the situation is distinguishable on the grounds that widows and minors are specifically dealt with as separate categories in the statute.[2]

**§1.3. Easements: Extent.** One of the most difficult tasks in the field of easements is the determination of the extent of an easement. It is a particularly vexing problem when the easement is created by prescription. The problem has its genesis in the peculiar manner in which such easements arise and in the legal justification for them. The rationale for recognizing a prescriptive easement is that an adverse use of another's land has been made continuously and uninterruptedly for the prescriptive period.[1] Since the easement arises out of a particular use, the nature and scope of the acquired right is limited by the scope and extent of the prior use which generated it.[2] Yet the exact repetition of the prior use is impossible.[3] If any practical use is to be made of such an easement, some variance must be permitted. The problem is thus one of determining the permissible degree of deviation.

The Restatement of Property offers as a divining rod the general principle that "a use made under a prescriptive easement must be consistent with the general pattern formed by the use by which the easement was created."[4] In determining whether a use falls within the "general pattern" of the prior use, the Restatement compares the particular use and the use by which the easement was created with respect to:

2 In the course of its opinion, the Court stated: "We are of opinion that these changes were intended to limit the exemption to one for the real estate, regardless of how many taxpayers who are co-owners are domiciled there." It is unclear, from a reading of the advance sheets, as to whether the Court was quoting the Appellate Tax Board or was itself making such a statement. If the Court made the statement, and did not merely quote the board, the question posed should be deemed to have been resolved by the generality of the language employed. This general statement indicates that where a widow and a minor are co-owners they only have a single $2000 exemption.

§1.3. 1 See 2 Powell, Real Property §416 (1952).

2 See 2 American Law of Property §8.68 (Casner ed. 1952); 4 Tiffany, Real Property §1209 (3d ed. 1939); Powell, *supra* note 1, at §416; 5 Restatement of Property §477, Comment *b*.

3 See authorities cited in note 2 *supra*.

4 Section 478, Comment *a*.

(a) their physical characteristics,
(b) their purpose,
(c) the relative burden caused by them upon the servient tenement.[5]

As an additional factor, the Restatement of Property would also take into account the needs which result from a normal evolution in the use of the dominant tenement.[6]

In *Lawless v. Trumbull,*[7] the trial judge concluded that a right of way "for travel on foot or by vehicles" had arisen as a result of an adverse use for the prescriptive period. The findings with respect to the adverse use established a relatively infrequent use of an old cart path for carrying out wood by "teams or trucks." The path was also used for foot travel by the adverse user and his family. On appeal, Spalding, J., held that the trial judge's ruling was too broad in that it permitted a general right to "travel . . . by vehicles." In reaching this result, the Court approved the general principle enunciated by the Restatement and compared the onerous burden imposed on the servient estate by general vehicular traffic with the prior infrequent transportation of firewood by teams and trucks.

The only difficulty which one has with the decision is that it leaves the details of the degree of permissible use to be worked out by the Land Court. This decision might not necessarily preclude the Land Court from entering a decree permitting limited travel by vehicle even though the purpose for such travel was not to carry out wood.

Problems as to the extent of an easement also arise when it is created by a written instrument or a court decree. The extent of this easement will be determined by an examination of the dispository language.[8] If it is ambiguous, the court will weigh various additional factors including:[9]

(a) Whether the easement was created by grant or reservation;
(b) Whether it was created gratuitously or for value;
(c) Whether a visible quasi-easement existed prior to the execution of the written instrument;
(d) Whether the parties have made a practical construction of the extent of the easement.

The problem frequently arises in the case of a deed creating an easement of way which was drawn in the days of the horse and buggy, and which refers to such ways of travel. The question then becomes one of determining whether a newer mode of transportation, such as the automobile, may be employed.

In *Deacy v. Berberian,*[10] a Land Court decree of 1912 provided for

5 Ibid.
6 Id. §479.
7 343 Mass. 561, 180 N.E.2d 80 (1962).
8 See Annotation, 156 A.L.R. 1050 (1945).
9 3 Powell, Real Property §415 (1952); 2 American Law of Property §§8.66-8.67 (Casner ed. 1952); 3 Tiffany, Real Property §802 (3d ed. 1939); 5 Restatement of Property §§482-486.
10 1962 Mass. Adv. Sh. 759, 182 N.E.2d 514.

"an easement to pass on foot or with a team." The Supreme Judicial Court construed this language as meaning, in 1962, "an easement for all purposes of ingress and egress common to a way." Such a construction would appear to permit the use of autos, and perhaps even trucks. In so holding, the Court reaffirmed its position of adapting the extent of an easement to the "means of transportation in common use by a succeeding generation." [11] Such words are construed as being merely illustrative or descriptive, rather than restrictive. It should be noted, however, that if the creating instrument contains express words of restriction, such as an easement of way "for teams only," it will not permit the use of the way by automobile.[12]

**§1.4. Breach of warranty: Oral representation pertaining to quality of real estate.** In *Pietrazak v. McDermott*,[1] the Supreme Judicial Court left open the question of whether one may recover for breach of warranty for an oral representation as to the quality of real estate. This year, in *Fogarty v. Van Loan*[2] the Court once again avoided the necessity of deciding the issue. In *Fogarty*, the seller and buyer entered into a purchase and sale agreement on September 15. Subsequent thereto, but before the closing, the seller said to the buyer: "Oh, yes, I will stand behind it, there is nothing wrong with the house." This statement formed the basis of the buyer's suit to recover for breach of warranty.

Two hurdles must be overcome before the Court will recognize such a cause of action. First of all, there is a serious doubt as to whether a warranty action should lie for oral representations pertaining to the quality of real estate. Second, it may be contended that the acceptance of a deed discharges all contractual and warranty obligations which are not referred to in the deed.[3] In *Fogarty*, the Court avoided the necessity of deciding these questions by disposing of the action on the grounds that the alleged warranty was made subsequent to the purchase and sale agreement without new consideration.

**§1.5. Easements: Creation and extinguishment.** The general rule is that when an easement is created for a particular purpose it is extinguished upon a cessation of that purpose.[1] In *Comeau v. Manzelli*,[2] the Supreme Judicial Court extended this concept to a situation in which the particular purpose for which the easement was purportedly created was, at the time of the attempt to create the easement, and has since remained, impossible of attainment.

In *Comeau*, the alleged owner of a right of way to a street claimed it

11 Swenson v. Marino, 306 Mass. 582, 587, 29 N.E.2d 15, 18 (1940).
12 Clarkin v. Duggan, 292 Mass. 263, 198 N.E. 170 (1935).

§1.4. 1 341 Mass. 107, 109, 167 N.E.2d 166, 168 (1960), noted in 1961 Ann. Surv. Mass. Law §3.4.
2 1962 Mass. Adv. Sh. 1013, 183 N.E.2d 111, also noted in §3.5 *infra*.
3 317 Mass. 716, 167 N.E.2d 166 (1945).

§1.5. 1 3 Tiffany, Real Property §817 (3d ed. 1939).
2 1962 Mass. Adv. Sh. 821, 182 N.E.2d 487.

pursuant to the terms of a deed, which both the owners of the dominant and servient estate (a predecessor in title of the petitioner in this action) assumed created an easement extending to the street. However, the courses and measurements described in the deed precluded the easement from extending to the street. In fact, in any event, it could not have since a person other than the grantor owned the land lying between the servient estate and the street.

Nevertheless, the owner of the dominant estate then contended that since there was an intent to grant an easement which would provide access to the street, such an intent should be effectuated by construing the granted easement as extending thirty-five or forty feet to a way which led to the street. Although the courses and measurement described in the deed failed to reach the way by this distance, it was contended that since there was a reference to the street, the street should be considered a monument establishing a boundary which would control the courses and distances described in the deed. The Court disposed of this contention by stating that such a construction would "arbitrarily disregard the carefully defined intent of the grantor that the easement be restricted to the course described in the deed and depicted on the plan recorded with the deed." The Court failed to explain, however, why the mistaken assumption of the grantor that the easement provided access to the street coupled with the general rule that monuments control over measurements were not sufficient to justify the adoption of a construction granting an easement to the way and thence to the street. This weakness in the Court's decision is mitigated, however, by its alternative holding that, in any event, the way in question had been abandoned.

The owner of the dominant estate then contended that even if the granted easement did not provide access to the street, he nevertheless had the right to use the easement area "to back trucks in and out and load at the edge of his own land by driving into the easement area." The Court held that since the only purpose for which the easement was created was to provide access to the street, it could not be construed to exist for any other purpose when the original sole purpose for creating the easement was, and has remained, impossible of attainment. In extending a rule which evolved in cases in which the easement, at the time of its creation, was capable of being used for the purpose for which it was created, to a situation in which the easement was never capable of being used for the intended purpose, the Court confuses the question of extinguishing easements that are in existence with the problem of determining whether an easement has ever been created and the scope of any such easement. Since the deed did refer to the purpose of the easement as being "for passing and repassing and delivery purposes," and since there was obviously an intent to create an easement, it would not appear to be implausible to construe the deed as having created an easement for a minor and subsidiary use such as "backing in trucks" which may well have been permissible uses within the framework of the larger purpose of obtaining access to the street.

The owner of the easement should not be totally frustrated in his use of the easement area merely because the main purpose for creating the easement cannot be attained. Perhaps the Court was influenced by the fact that the owner of the dominant estate merely claimed a right of way to the street in his answer and did not explicitly state a claim in the alternative in the answer for a more limited use.

**§1.6. Record and marketable title.** Quite frequently, a purchase and sale agreement may call for a deed conveying a "good and clear record and marketable title." In *Tramontozzi v. D'Amicis,*[1] the Supreme Judicial Court held that a reference in a probate inventory to an unrecorded mortgage does not prevent the seller from having a "record title." In this case, a previous owner of the premises died in 1913 and in the probate of his estate that same year an inventory was filed which listed the premises in question with the following notation: "estate on Adams Street subject to the following mortgages, Mrs. C. G. Wiswell, $3,000.00; Mrs. E. S. Smith, $1600.00; Cambridge Savings Bank, $400.00." There is no record in the registry of deeds of the Smith mortgage. The Court held that this notation did not impair the record title and that this reference did not afford "actual notice" of the existence of the unrecorded mortgage. The Court's holding with respect to actual notices is, of course, consistent with the general rule of the Court that actual notice be established by "strong proof." [2]

The Court, however, failed to discuss why this probate notation did not affect the marketability of the title. A marketable title has been defined as a "title free from reasonable doubt both as to matters of law and fact." [3] Although the reference to the unrecorded mortgage in a probate inventory may not have impaired the record title and may not constitute actual notice of the existence of a mortgage, the opinion does not discuss whether a reasonable purchaser would be willing to accept such a title, especially when the other mortgages referred to in the inventory were evidently recorded. Record title and marketable title are not synonymous. A record title might still be open to something off the record.[4] It may be possible to justify a conclusion that the title is marketable by adopting, by analogy, the policy enunciated in the statute limiting the enforceability of obsolete mortgages.[5]

**§1.7. Misdescription in deed and certificate of title: Recovery in contract.** In *Overly v. Treasurer and Receiver General,*[1] a purchaser, in reliance upon the accuracy of the description contained in the seller's certificate of title to registered land, took a deed from the seller with like description, for which the purchaser paid a substantial sum of money. A certificate of title containing this description was duly

§1.6. 1 1962 Mass. Adv. Sh. 985, 183 N.E.2d 295.
2 Dailey, Reliability of Record Title, Practical Conveyancing 23, 41 (1958).
3 3 American Law of Property §11.48 (Casner ed. 1952).
4 Swaim, Purchase and Sale Agreement, Practical Conveyancing 6, 9 (1958).
5 G.L., c. 260, §33.

§1.7. 1 1962 Mass. Adv. Sh. 599, 181 N.E.2d 660.

issued to the plaintiff. Supposing that she was the owner of a lot some 900 feet in depth, the purchaser built a house set back from the ocean. Subsequently the buyer discovered that the lot was only 300 feet deep and that as a consequence the northerly line ran so close to the house as to seriously impair its value. The purchaser sued the seller in contract and argued that she was promised a lot some 900 feet deep, and received a lot only 300 feet deep. One of the monuments referred to in the deed and the certificate of title — the ocean — was 600 feet further north than was stated, so that the northwesterly and southeasterly side lines, which were represented to be 900 and 950 feet long respectively, were each only 300 feet in length. The plaintiff did not allege in her declaration that quantity of land was a material element or the essence of the bargain.

The Supreme Judicial Court, in the course of sustaining the plaintiff's contentions, did recognize the existence of the principle that the metes and bounds set out in a deed are usually deemed to be merely descriptive when the purchase price is stated in a lump sum and the lot is described by monuments. Yet it allowed the plaintiff to recover on the grounds of "gross mistake" since there was a very great discrepancy between the description of land in the deed and the land actually conveyed.

In the earlier case of *Pybus v. Grasso*,[2] the Court had held that the acceptance of a deed following a purchase and sale agreement discharges the seller from any obligations undertaken in the agreement. The Court distinguished *Pybus* on the grounds that a deed only acts as a contract between the parties when registered land is being conveyed.[3] The difficulty one has with this line of reasoning is that the issuance of a certificate of title should be treated as being equivalent to the acceptance of a deed to unregistered land. By analogy to *Pybus*, the issuance of the certificate should discharge the contractual duties of the seller.

Nevertheless, the result in the *Overly* case may be justified on the basis that the misdescriptions also appeared in the certificate of title.[4] The Court, however, does not rest its decision upon that basis. Evidently, the Court might conceivably have allowed the purchaser to recover even though there was no misdescription in the deed.

It is unclear, from a reading of the opinion, as to what was the exact nature of the plaintiff's theory of recovery. The result of holding in favor of the plaintiff on the grounds of gross mistake is reasonable if the plaintiff was seeking partial restitution. One has greater difficulty, however, if the plaintiff's suit was based on a breach of promise to convey a lot 900 feet deep.

**§1.8. Right of recovery against assurance fund.** Under the title registration system, a fund has been created to reimburse persons who have been damaged by an error in the registration process. General

2 317 Mass. 716, 59 N.E.2d 289 (1945).

3 G.L., c. 185, §57.

4 See 4 Williston, Contracts §926 (rev. ed. 1936); 2 Restatement of Contracts §413.

Laws, c. 185, §101, allows recovery to a "person who, without negligence on his part, sustains loss or damage, or is deprived of land, by the registration of another person as owner of such land or any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title . . ." Unless the assurance fund is subjected to a heavy call before attaining adequate size,[1] it should accumulate and become quite sizable. Thus, in Massachusetts, there was a balance on hand on December 31, 1951, of $373,700.88 after having paid claims aggregating $9300.[2] Illinois had a balance of $869,786.13 in 1950.[3] South Australia has collected over £300,000 and has paid out nothing, and in New South Wales and in Queensland the assurance assets were turned over to state reserve funds because they were greatly in excess of any amounts likely to be needed to meet any future claims.[4] These statistics indicate that the Torrens system is working fairly well and that there has been a paucity of litigation in this area.

*Overly v. Treasurer & Receiver General*[5] appears to be the first case[6] presenting the question of whether one may recover from the assurance fund if he suffers damage because of an error or misdescription in a certificate of title even though the error may also have appeared in the original registration decree and even though he has not been deprived of an interest in the land by the registration of interests in other persons. In answering the question in the affirmative, the Court rejected the treasurer's contentions that the phrases in Section 101 "after the original registration of land" and "by the registration of another person as owner" modified the phrase "loss or damage." It read Section 101 as permitting recovery against the fund by a "person who, without negligence on his part, sustains loss or damage . . . in consequence of any error . . . mistake or misdescription in any certificate of title."

**§1.9. Liability of bailees: Contractual limitations.** A majority of courts have held that a bailee may not, on grounds of public policy, contract to exculpate himself from liability for his own negligence.[1] Nevertheless, the prevailing view is that a limitation on liability, as distinguished from an exemption from liability, is valid.[2] No great difficulty is encountered in the application of these rules when only two parties (the original bailor and the original bailee) are involved. The problem arises when the bailee has rebailed the goods to another person, whom we shall call a sub-bailee.

§1.8. [1] See Gill v. Johnson, 21 Cal. App. 2d 649, 69 P.2d 1016 (1937), in which the payment of one claim wiped out an entire fund.

[2] 4 American Law of Property §17.48 n.6 (Casner ed. 1952).

[3] Ibid.

[4] Ruoff, An Englishman Looks at the Torrens System, 26 Austl. L.J. 194 (1952).

[5] 1962 Mass. Adv. Sh. 599, 181 N.E.2d 660.

[6] Cf. Briggs v. Treasurer & Receiver General, 224 Mass. 46, 112 N.E. 487 (1916).

§1.9. [1] Brown, Personal Property §84, p. 339 (2d ed. 1955). See, contra, 2 Restatement of Contracts §574.

[2] Brown, Personal Property §84, p. 339 n.57 (2d ed. 1955).

In *Bean v. Security Fur Storage Warehouse Inc.*,[3] the plaintiff bailor took a coat to a bailee for cleaning, repairs and storage. The bailee, in turn, delivered the coat to the defendant, who operated a wholesale fur storage warehouse. In the contract between the bailor and the first bailee, there was a clause limiting the liability of the first bailee to the lesser of the declared value of the coat or the cost of replacement or repair of the coat. The bailor alleged that the coat was "taken or lost" owing to the negligence of the defendant.

The Supreme Judicial Court recognized that, if the plaintiff had sued the first bailee, the plaintiff would have been bound by the limitation on liability clause. It avoided the necessity of determining whether the defendant would be entitled to the benefit of the contract limitations by disposing of the case on procedural and evidentiary grounds.[4] If the problem should subsequently reach the Court again, it is hoped that the Court will not adopt the illogical thinking of the Ohio court[5] which stated in its decision that the extent of damages recoverable may be governed by the terms of the contract between the original parties since the only basis for imposing liability and a duty of care[6] upon the defendant is the finding of an implied authority (in the original contract) in the bailee to rebail the goods.

**§1.10. Landlord and tenant.** Annually, the Court decides a number of interesting questions in the landlord and tenant area. This year's crop of cases proved to be no exception in this regard.

Prior decisions have imposed a duty upon the owner or possessor of premises to warn of hidden defects known to the owner or possessor or of which he should reasonably have known.[1] In *Summering v. Berger Realty, Inc.*,[2] the injured plaintiff sought to extend this duty to a tenant who does not control the premises where the injury occurred but who is merely entitled to the use of the premises in common with other tenants. The Court expressed no opinion as to whether such an obligation would be imposed on a tenant since it found that there was no evidence of hidden defects known to the tenant which were not apparent to the injured plaintiff.

The key factor in allocating tort liability between the landlord and the tenant for injuries received by third persons is the determination of whether the landlord or the tenant was in control of the premises where the injury occurred.[3] In *Boronskis v. Texas Co.*,[4] the terms of the lease provided that the repairs and maintenance of the leased gas

[3] 1962 Mass. Adv. Sh. 1179, 184 N.E.2d 64.

[4] The Court noted: "If the case should reach us again, we hope that this question will be adequately briefed." 1962 Mass. Adv. Sh. at 1184, 184 N.E.2d at 68.

[5] United States Fire Insurance Co. v. Paramount Fur Service, Inc., 168 Ohio St. 431, 156 N.E.2d 121 (1959).

[6] This is doubtful.

§1.10. [1] See Wilson v. Conlin, 338 Mass. 295, 297, 154 N.E.2d 894, 895 (1959).

[2] 1962 Mass. Adv. Sh. 441, 181 N.E.2d 348.

[3] Prosser, Torts §80 (2d ed. 1955).

[4] 1962 Mass. Adv. Sh. 941, 183 N.E.2d 127.

station were the responsibility of the lessee. A question was raised as to whether an injured third person could prove that the lessor had retained and exercised control, despite the terms of the lease, by the fact that during the period of the lease (about fourteen years) the defendant lessor had voluntarily attended to virtually all of the repairs. The Court held that the parol evidence rule did not preclude such proof of control in the lessor since that rule is inapplicable to third persons who are not parties to the contract.

The majority of courts have held that when a landlord's contract to repair is broken, the only remedy is a contract action by the tenant for the breach.[5] Failure to repair under such a covenant does not constitute a basis for the imposition of tort liability. In *Schopen v. Rando*,[6] the Court reaffirmed its adherence to the majority view.

[5] Prosser, Selected Topics on the Law of Torts 380, 394-400 (1954); Bohlen, Landlord and Tenant, 35 Harv. L. Rev. 633 (1922); but cf. 2 Restatement of Torts §§357, 378.

[6] 343 Mass. 529, 179 N.E.2d 822 (1962).