REAL PROPERTY

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There is no question but that the shift from professor to justice has not deprived the realm of real property law of the advancements it needs and gets from Bora Laskin. Throughout this survey he will appear and reappear.

I. Rule Against Perpetuities

To begin, he writes the opinion of the Ontario Court of Appeal [1] in a matter which even in his case book [2] was left largely unanswered. Unfortunately, this decision does not require a direct answer on the point either. The question is this: is the interest of a grantor, after conveying a fee simple determinable or a fee simple subject to a condition subsequent, to be caught by the rule against perpetuities? It has long been assumed that the interest retained by a grantor after creating a fee simple subject to a condition subsequent, *i.e.*, a right of re-entry, runs afoul of the rule resulting in the grantee receiving a fee simple absolute. (This result apparently arises because the conveyance would then read somewhat as follows: "To *A* and his heirs but if liquor is ever sold on the premises . . . ." As the right of re-entry has been deleted from the above—being violative of the rule against perpetuities— that which remains does not make sense and *A* gets the fee simple absolute). This assumption pervades legal thinking in nearly every geographic area of the common-law world—in other words, no controversy over the result. The reasoning is perhaps best explained on the basis that the right of re-entry must actually be exercised by the grantor at some remote future date and is created fully only when he makes the move; thus, no vesting has taken place. However, when one looks at the interest remaining in the grantor after he has created in the grantee a fee simple determinable, different considerations apply. This possibility of reverter may not come to fruition for a very long time either, but it differs because it is automatic; that is, no step to revest is needed since the interest, by law, is taken from the grantee, and the grantor is back where he started. Courts in the United States [3] have largely concluded that possibilities of reverter are not subject to the rule against perpetuities and the

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[1] *Re* North Gower Township Pub. School Bd., [1968] 1 Ont. 63, 65 D.L.R.2d 421 (1967).

[2] B. Laskin, Cases and Notes on Land Law (1958).

result is of course that the estate of the grantee does not come to a fee simple absolute but remains a determinable fee. English decisions on the other hand have gone the other way and held the possibility of reverter to be in the same class as the right of re-entry and thus open to destruction. We in Canada have for many years been somewhere in between, at least until comparatively recent times. With the recent decision in *Re Tilbury West Public School Board*, [4] it can be argued with some force now that we lean more to America than to England in this regard. This case illustrates a modern approach to a construction of words which could fall into one state of title or be jammed into another. Also, having decided that the title was to be fee simple subject to condition subsequent, it then proceeded to apply the rule against perpetuities. This is straightforward. What is interesting is the reference by Mr. Justice Laskin to section 15 of the "new" Ontario Perpetuities Act. [5] There is no question that with this section the lacuna of the common law is filled and possibilities of reverter are swept into the rule.

II. Restrictive Covenants

A second area of land law which has bothered solicitors for a long time is that of the running of restrictive covenants. We have been able to decide for a considerable period of history that the benefit side of covenants can be made to run with some ease whereas the burden side takes longer and requires more finesse. The equity side, as portrayed in *Tulk v. Moxhay* [6] and more modern "positive burden" cases, [7] has enabled "running" to emerge almost completely. It is well known that in one of the remote pockets of this highly integrated plan is a prerequisite known as a "building scheme," so that if such a scheme is present, covenants have an easier time. Not many problems have developed in the determination of the constitution of a building scheme and it has stood with some ease of description for a considerable period. Complacency disappears, however, when a "hard" case appears and one interested in the restrictive covenant area might well study the decision of the Ontario High Court in *Shen Investment Ltd. v. Mosca*. [8] The facts are simple and it is submitted that this is part of the problem. The grantor established a small shopping centre of five stores and the deeds to each of the five original grantees contained covenants by them not to compete in the operation of the stores. The grantor sold all of his interest to the parties and was obviously no longer interested in what went on in the plaza. A lessee of one of the original grantees began to compete and the developer (grantor) sought injunctive relief, which was

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[3] *See, e.g.*, C. Smith, Survey of the Law of Real Property 127 (1956).

[4] 55 D.L.R.2d 407 (Ont. High Ct. 1966).

[5] Ont. Stat. 1966 c. 113.

[6] 41 Eng. Rep. 1143 (Ch. 1848).

[7] Parkinson v. Reid, [1966] Sup. Ct. 162, 56 D.L.R.2d 315.

[8] 68 D.L.R.2d 372 (Ont. High Ct. 1968).

denied. What is interesting about the case is this: the running of the restrictive covenant was halted on the basis of lack of privity between the developer and the lessee. This gap is ordinarily bridged by the running of the covenant into the lessee where a building scheme was underway. It is difficult to imagine a case more appropriate to fit into a description of "building scheme" than this. There were five pieces of contiguous property all carved from one original; the same grantor existed in all five conveyances; and, each of the five deeds contained the same basic restrictions. It would appear that the decision in *Scharf v. Mac's Milk Ltd.* [9] follows a more rational course in this area and contributes a good deal more to the continuity and predictability sought after.

III. MORTGAGES

The past year has seen several mortgage cases arise; some of them consolidate and clarify old situations that have continued to bother, whereas others break new ground. The start that was made within the last five years on "unconscionable" transactions, stemming from two Canadian cases [10] which were based to some extent on the collateral advantage case of *Kreglinger v. New Patagonia Meat & Cold Storage Co.*, [11] is continued but on the somewhat firmer base of legislation. Passage of legislation giving relief in the case of unconscionable transactions is now almost universal and while the various acts to a large extent reflect the existing common law, their mere presence is formidable. Two cases out of the growing list are worthy of special note.

The first, *Collins v. Forest Hill Investment Corp.*, [12] involving a fifty per cent bonus on a 1,500 dollars loan with an interest rate expressed to be seven per cent applicable to the resulting principal of 2,250 dollars, was held to be unconscionable under the Ontario act. [13] The case is itself interesting from two points of view. First, a plea of *non est factum* had been advanced by the mortgagor. A similar plea had arisen before Mr. Justice Coffin in *Longley v. Barbrick* [14] and in the present case a rather succinct criticism of Coffin's position was advanced. One interested in this sort of plea would do well to compare the two positions. Second, the manner of concluding that the loan was unconscionable, based largely on the risk factor, is somewhat of a new departure that bears future watching. Indeed, the test advanced previously in *Longley v. Barbrick* [15]—that of inordinate charges

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[9] [1965] 2 Ont. 640, 51 D.L.R.2d 565.

[10] Longley v. Barbrick, 36 D.L.R.2d 672 (N.S. Sup. Ct. 1962), and Stephen Invs. Ltd. v. Le Blanc, 37 D.L.R.2d 356 (Alta. Sup. Ct. 1963).

[11] [1914] A.C. 25.

[12] 63 D.L.R.2d 492 (Ont. County Ct. 1967).

[13] Unconscionable Transactions Relief Act, ONT. REV. STAT. c. 410 (1960).

[14] 36 D.L.R.2d 672 (N.S. Sup. Ct. 1962).

[15] *Id.*

alone being harsh and oppressive and thus unconscionable—contrasted with the test of "servient position" advanced in *Stephen Investments Ltd. v. Le Blanc*, [16] is now faced with a competitor in the role of "risk."

With this background then, the second case, *Miller v. Lavoie*, [17] is of even more interest. Here, a mortgagor borrowed approximately 7,000 dollars with an interest rate of some thirty per cent. The Contracts Relief Act [18] of British Columbia, copied from the Ontario statute referred to above, was invoked by the mortgagor. The court refused relief as requested, stating that in the light of the risk involved (partially completed building on mortgaged land and "terrible" credit rating of mortgagor) the rate of thirty per cent was not inordinate. A careful perusal of the judgment does not leave much doubt that the factors to be considered, before this court at least, are rates of interest and risk. Perhaps one could be permitted to observe that it really would be derelict for a court to consider anything less today than rate of interest (including other costs, or bonus), risk factors (both land and person), surrounding circumstances (such as nearby, equivalent land values and lending rates) and the relative positions of the parties. The last of these will presumably be required only in a cursory fashion in the great majority of cases.

Because mortgagors are children of equity, one continually finds new equities being raised, either on older lines or on more inventive bases. Some years ago, it had been established that in a jurisdiction where strict foreclosure was permitted, and thus in most common-law areas, the mortgagor could ask for redemption even after order absolute. [19]

The procedure is well known. Once there is default, legal rights disappear; the "right" of redemption is gone for the condition subsequent can never happen. There arises then the equitable right to redeem. The so-called "equity of redemption," which unfortunately is attached to the interest of the mortgagor the moment he gives up legal title to the mortgagee and which really should be reserved for a description of his interest "post-default," is sought to be shut off then by a bill to foreclose brought by the mortgagee. This equitable right continues until order absolute of foreclosure is dispensed. *Any* right, legal or equitable, is then forever gone. Or so we are led to believe. Certainly on a semantic basis, the "right" is indeed gone; but it will mysteriously arise, not now as a "right" but under the cloak of judicial discretion. There is probably no doubt that there is the occasional, isolated case where to do otherwise would wreak injustice; the same result can come from the opposite direction as well. We should keep in mind the *raison d'être* of the bill to foreclose. Without this equitable

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[16] 37 D.L.R.2d 346 (N.S. Sup. Ct. 1962).

[17] 60 D.L.R.2d 495 (B.C. Sup. Ct. 1966).

[18] B.C. Stat. 1964 c. 11.

[19] *See* Campbell v. Holyland, 7 Ch. D. 166 (1877).

remedy the mortgagee is in the position of having legal title to the property by the mortgage deed brought to fruition by default and still being subject always to the over-hanging threat of redemption. If he is then replaced in this hazardous position even after foreclosure then the pattern is again disturbed. In this light then the opinion of the Supreme Court of Canada in *Alexanian v. Dolinski* [20] on the "right" to open foreclosure after order absolute is much to be prized. Here, even though the mortgagee had sold the property after order absolute to an employee of the mortgagor, the latter was seen to be bona fide, and thus the need to re-open was not present. Only one feature of this case requires further comment: the basic lesson of this judgment is that although here the mortgagor lost, he lost not because he was too late, but because the facts were not in his favour. Of course, this can only lead one to the conclusion that different facts would perhaps lead to a different conclusion.

Five cases on four different mortgage problems present themselves now with some interest in each. Those who in Nova Scotia are faced with foreclosure and sale (judicial sale) as the tool against the security will surely be interested in a decision by Chief Justice Cowan in *Briand v. Carver.* [21] The lack of power of sale proceedings in Nova Scotia (due perhaps to the failure of the legislation to allow a purchaser to buy in at the sale unless judicially ordered) has forced judicial sale into a rather tight mould which was beginning to expand with the consequent pressure. This decision is one of mandatory interest then to practitioners in Nova Scotia for it lays bare the essential requirements procedurally required.

The second point, arising from the decision in *Northern Heights (Sault) Ltd. v. Belgrand Investments Ltd.*, [22] concerns the right of the mortgagor to an accounting by the mortgagee. There has never been any real problem with this and the initial holding of the court, that to seek an accounting a mortgagor must first offer to redeem, is not of great consequence. What is interesting about this decision is that it provides that not only must the mortgagor be the plaintiff (here, a developer of a 248 lot subdivision, all 248 being originally under the mortgage) but those who acquired any interest in the mortgaged lands after the imposition of the mortgage must also come in. If the decision of this court is that all are parties who (having bought subsequent to the mortgage) now own lots which are still subject to the mortgage, then no one would quarrel with it. If, however, as the judgment apparently reads, it is that those assignees of once-mortgaged lots, who paid off and received discharges through partial discharge and release means, are as well necessary parties, then one might query why. It is submitted that the reason why the assignees need be

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[20] [1968] Sup. Ct. 473, 67 D.L.R.2d 646.

[21] 66 D.L.R.2d 169 (N.S. Sup. Ct. 1967).

[22] 68 D.L.R.2d 703 (Ont. High Ct. 1968).

joined as plaintiffs (and if they refuse, as defendants) is to provide the mortgagee with some measure of protection and, if this is so, released assignees should not be involved in the case.

The third case, *Kilgoran Hotels Ltd. v. Samek*,[23] deals with a matter more than familiar to followers of mortgage law—section 6 of the Interest Act.[24] The old line of cases, of which *London Loan & Savings Co. v. Meagher*[25] and *Asconi Building Corp. v. Vocisano*[26] are but two, is topped now with a further decision of the Supreme Court of Canada. Once again the question is primarily the simple one of what, in the three prescribed repayment methods of section 6, is the extent of the phrase "blended payments." The facts here are simple : *A* agreed to repay to *B* a sum of money each month that was to be applied, first, in the payment of the previous period's interest and, second, the balance to retire the principal; the interest rate was set forth. The argument proceeded on the basis that as a fixed sum was payable at stated intervals (to be then divided on an interest-principal basis) that sum was therefore a "blended payment," that the section thus became alive, and that no interest could then be collected as the interest statement was not satisfied as the act requires. The Court did not accept this argument and one could say that *A*'s request was summarily dismissed. There is a lingering doubt however. If one agrees with the disposition of this case (and the motivation for the decision is clear and express : the borrower has been told the cost of borrowing and the spirit of the act has thus been satisfied) that a computation can be made by the borrower each time he makes a payment and that he can subtract the interest figure and get a repayment figure, then could not one say the same for any borrower in a situation where a blended system is no doubt in effect, *e.g.*, under a N.H.A. mortgage? For here, where the monthly payment is, say, 100 dollars per month, principal and interest, then any borrower can take an amortization table, compute the interest for the month, compute the principal and know where he stands. One would have thought "blended" meant what it says : single payment of principal and interest.

Fourth, on mortgage law, a small caveat. If one hurries, the difference between marshalling and consolidation can be overlooked and a dangerous situation develops. It is somewhat distressing then to find a court, when faced with a marshalling situation, relying on the doctrine of consolidation as an aid to solution. In *Seel Investments Ltd. v. Greater Canadian Securities Corp.*,[27] a quotation from a text[28] was used which dealt with consolidation where marshalling was at stake.

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[23] [1968] Sup. Ct. 3, 65 D.L.R.2d 534 (1967).

[24] CAN. REV. STAT. c. 156 (1952).

[25] [1930] Sup. Ct. 378, 2 D.L.R. 849.

[26] [1947] Sup. Ct. 358, 1 D.L.R. 794 (1948).

[27] 65 D.L.R.2d 45 (Ont. High Ct. 1967).

[28] *Id.* at 47.

Finally, it has long been the law in strict foreclosure that a mortgagee who sues on the covenant must be in a position to reconvey the property. If, therefore, the mortgagee has foreclosed and then sold to a third party, no suit on the covenant can follow. Where power of sale rather than foreclosure is exercised, however, it is just as clear that, even though unable to reconvey, the mortgagee can sue (now for a deficiency) on the covenant (the same of course is true after judicial sale). The difference between the two positions is quite easily explained. In the foreclosure proceedings, this remedy puts the mortgagee in the position of owning the fee by default on the part of the mortgagor. What the mortgagee then does cannot be traced to the mortgagor; the mortgagee then moves on his own, as a stranger. In other words, the remedy of foreclosure has come about as a result of the mortgagor's fault; election of this remedy is as far as the mortgagee can go. If he now goes further, new rights of redemption arise in the mortgagor. In power of sale (or judicial sale) the fault of the mortgagor has brought about the sale. The property is thus at first hand out of the power of the mortgagee and accordingly the inability of the mortgagee now to reconvey is directly attributable to the mortgagor. The simple test is clear: if it is the fault of the mortgagor, inability to reconvey on a covenant suit is excused.

Apply this philosophy then to a recent Ontario case. In *Geidlinger v. Kierans*,[29] the mortgagor had placed two mortgages on the property, the first to *A* and the second to *B*. Following default on both, the mortgagor conveyed his equity to *A*. This was followed by a quit-claim deed from *B* to *A* (second mortgagee conveys his interest to first mortgagee). *B* now sues mortgagor on the covenant and is met with the usual defence: "since you cannot reconvey, you cannot sue." If the court (as it here does) follows the argument presented earlier, no real problems arise. Inability of *B* to reconvey is solely the fault of the mortgagor and since *B* made only one move, he is still privileged. As the deed was given to forestall foreclosure and as that was the fault of the mortgagor, *B* succeeds.

IV. Easements and Related Rights

The law of easements is represented by three or four interesting decisions during the past twelve months. In *Affleck v. Gue*,[30] the classic example of implied easements was initially presented in that two contiguous lots were at one time owned by a single person. A sewer ran from lot one under lot two to a creek and had been in use for a long period prior to acquisition of the burdened lot by the plaintiff. The following year the existence of the sewer was discovered when the plaintiff excavated for his foundation. The plaintiff and defendant (owner of lot two) agreed to a

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[29] Geidlinger v. Kierans, 60 D.L.R.2d 32 (Ont. High Ct. 1966).

[30] 61 D.L.R.2d 665 (N.S. Sup. Ct. 1967).

new connection to town services (thus ceasing to use the creek) but unfortunately the line across lot one became clogged with tree roots and others and could only be replaced by excavation on lot one with resultant damage to plaintiff's interest therein. Plaintiff revoked the "privilege" and denied access to the defendant. The question, of course, was the right of the plaintiff to revoke, this in turn depending on the nature of the interest of the defendant in lot one. Was his interest to be labelled "easement" or "licence"? If the former, no revocation was possible; the opposite would be true if the latter categorization was made. The court held for the latter on the ground that implied easements by reservation are allowed to come about only where there is a way of necessity and as there were alternate ways available under the facts of this case then no necessity arose. It might be worth pointing out to the reader that chronological order of sale of lots is always important in these cases since a sale of a quasi-servient lot by the common vendor, if it precedes a sale of the quasi-dominant, will be classified as a reservation case whereas a switch in order, sale of quasi-dominant first, will result in implied grant. As the latter does not involve any derogation from grant, no great injury to purchasers can result.

A further and allied problem in easements arose in *Temma Realty Co. v. Rees Enterprises Ltd.* [31] It is allied for it concerns the manner of creation of easements as well. This time the easement was alleged to have been created by prescription and one important point is portrayed in the case. The manner of user established before the court was that common carriers, truckers and independent contractors had used the alleged right of way for the requisite period of time and this type of user was then held insufficient. It is clear from this decision that if the owner of the benefited land wishes to claim an easement over the adjoining parcel then to succeed he must either by himself, or through his servants, exercise the use. Use by those beyond his control will not be sufficient.

Not easements but licences is the subject of the third of this class of cases. The recent rise in urban development by the use of condominia has sponsored considerable anxiety and this is reflected to a considerable degree in *Goodman v. Freeborn.* [32] Fortunately, the case is not as serious as might at first glance be supposed, as is evidenced by the opening words of Mr. Justice Laskin (who writes the opinion of the court) : "This case, however decided, demonstrates the need for condominium legislation." [33] The fact that Ontario has such legislation now (along with a number of other common-law jurisdictions) does not displace the value of this case for those areas which do not. The case illustrates the terrible inequities

[31] 64 D.L.R.2d 602 (Ont. High Ct. 1967).

[32] [1968] 1 Ont. 105, 65 D.L.R.2d 545 (1967).

[33] [1968] 1 Ont. at 106, 65 D.L.R.2d at 546.

that can result if a condominium development proceeds on an ad hoc basis. One interested in this area of development and secured financing should read this case both in the High Court [34] and the Court of Appeal.

Finally, in this area, after reading the Court of Appeal decision above, one can continue along on the next page to the little pocket of law known as lateral and subjacent support. In the decision of the Ontario High Court in *Delorme v. Metcalfe Realty Co.*, [35] is a statement that one should ponder for a moment: "There is no question about the plaintiffs being entitled to an easement of support for their building . . . ." [36] Is it possible to be as categorical as this and conclude that the right to support—lateral or subjacent—comes about by way of easement? It is true, of course, that support rights may be established in this manner. But is it not more correct to say that the right to support is a natural right inherent in the soil acquired by tenancy of an estate?

Closely allied with easements is another interest in land less than an estate. We are all somewhat familiar with the fact that there are rules about rights in flowing streams, lakes, and so forth and that ownership of beds is sometimes controlling of water rights as well. However, we have always had problems in this country because of the combination of our geography and the reception of English common law. While English rules as to riparian rights may well suit English rivers, for example, all being tidal for the most part, such a situation is just not present in a country as vast as this one. When one then attempts to superimpose English rules on Canadian rivers, one is in instant trouble. Thus it is always interesting to find new cases on water law in Canadian courts.

In the first [37] of two cases to look at, a new start at departure from the English rule is at least attempted. Mr. Justice Laskin states in *B.W. Powers & Son Ltd. v. Trenton*: [37] "I do not agree with the town's position on the application of the English common law rule on which it relies . . . . In terms of the common law, I would be disposed to agree with Anglin, J. . . . that the *ad medium filum* rule does not apply to navigable rivers in this Province, and hence would not apply to the Trent River." [38] Unfortunately, this piece is dictum, as a statute intervenes. One can only hope that soon the case will arise without the intervention so that a start can at least be made to untangle the web we have placed on riparian law.

In *Lockwood v. Brentwood Park Investments Ltd.*, [39] the result of riparian rights is considered and a discussion of the rights of upper and

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[34] [1967] 1 Ont. 454, 61 D.L.R.2d 200 (High Ct.).

[35] [1968] 1 Ont. 124, 65 D.L.R.2d 564 (High Ct. 1967).

[36] [1968] 1 Ont. at 125, 65 D.L.R.2d at 565.

[37] 64 D.L.R.2d 1 (Ont. 1967).

[38] *Id.* at 13.

[39] 64 D.L.R.2d 212 (N.S. Sup. Ct. 1967).

lower riparian owners ensues. Following a list of possible causes of complaint on which a lower riparian owner could found an action and a comparable list of rights attached to ownership of upper riparian land, is a solution by the court which can only be described as pure equity at work. Injunctive relief claimed by a lower riparian owner is denied even though he has a "good case" until it is ascertained whether installation of a larger pipe by the offending upper riparian owner is complete. It is this kind of settlement which most effectively deals with these problems. In a way it is perhaps possible to conclude that this kind of action should thus have been settled extra-judicially; but then, one can counter by concluding again that perhaps a decision will bring predictability and thus efficacy.

V. Landlord and Tenant

Landlord and tenant cases roam through the reports as ever and a number are worth looking at. First, the old "fixture" problem is displayed and neatly handled in a somewhat novel situation. In *Westown Plaza Ltd. v. Steinberg's Ltd.*,[40] the lessor had covenanted to pay real property taxes and the lessee in turn had promised to bear the personal property taxes. As is usually the case there is a straddler. The municipality imposed a new tax to be applicable to trade fixtures. Who is to pay is determined by the answer to the question : Real or Personal? While it might be easy to be misled into the error of assuming that because trade fixtures (under normal landlord and tenant rules) are removable at the end of the term and thus might be classified as personal, it is better to remember that fixtures are real property while attached and in this regard the old adage that fixtures are realty with a chattel past and the fear of a chattel future is helpful.

One should, if interested in landlord and tenant, then go to a decision of the Manitoba Queen's Beach. Here is true dilemma. In *Gentz v. Dawson*,[41] the municipality required a new fire device to be installed. The landlord was not required to perform the installation; but similarly, neither was the tenant (by the terms of the lease). What to do? Who to do it? Decision? Tenant may put it in and can later take it with him. Neat.

If you read the reports from month to month one factor keeps constantly reappearing : today's legal problems in many fields are arising from fact situations involving shopping centres. The newness and the size, of course, contribute. Perhaps it is time for shopping centre lawyers; perhaps there already are some. In any event, consider *Clark's-Gamble of Canada Ltd. v. Grant Park Plaza Ltd.*[42] The lessor agreed with the

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[40] [1967] Sup. Ct. 510, 62 D.L.R.2d 658.

[41] 60 D.L.R.2d 545 (Man. Q.B. 1966).

[42] [1967] Sup. Ct. 614, 64 D.L.R.2d 570.

lessee that the shopping centre would be "approximately as shown on plans." Later the developer-lessor leased a store to a competitor, which move was not portrayed on the "plans."

Two points arise from this case and they lead to a single conclusion. First, a lease to a competitor does not by itself amount to a derogation from grant for the reason that such a move does not render the original premises leased unfit for the purpose for which they were leased; and, second, as the clause "approximately as shown on plans" was dealt with in the negotiations for a lease but does not appear in the lease itself, no derogation could be upheld in any event. The conclusion is inescapable; it is a moral : a developer of a centre has to be extremely careful in his draftsmanship, more here than perhaps anywhere else with the exception of documentation in a condominium.

While on the subject of shopping centres, one should refer briefly at least to their early life as they can present monumental problems in the priority field. So far as the priority picture is concerned one should then study closely the decision [43] of the Supreme Court of Ontario in *Traders Realty Ltd. v. Huron Heights Shopping Plaza Ltd.*, where execution creditors battle with mechanic lien holders.

VI. Miscellaneous Cases

Law students, and one would suppose the occasional practicing solicitor, sometimes have difficulty distinguishing between an assignment and a sub-lease when really the distinction is very simple. The results of classification have heavy and wide-ranging results not only in landlord and tenant law but also in the area of mortgage of leasehold. A quick reference to the recent British Columbia case, *Re Land Registry Act*, [44] would perhaps help to clarify the problem.

Further, the year has been plagued with "seal" cases and one would have thought that all that could be said on seals and their meanings and requirements had been said. Not so, however, and the range is quite wide.

We have a seal omitted at signing time, later placed there by an employee of the other party; [45] missing seal, none at hand, placing of finger momentarily on sealing place; [46] and, finally, the rather unique situation of a missing seal where the defendant tore it off and ate it! [47]

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[43] 64 D.L.R.2d 278 (Ont. Sup. Ct. 1967)

[44] 61 W.W.R. (n.s.) 65 (B.C. Sup. Ct. 1967).

[45] Linton v. Royal Bank of Canada, 60 D.L.R.2d 398 (Ont. High Ct. 1966).

[46] Wulff v. Oliver, 65 D.L.R.2d 155 (B.C. Sup. Ct.)

[47] Royal Bank of Canada v. Kiska, 63 D.L.R.2d 582 (Ont. 1967).

To conclude in a more serious vein, a situation of joint tenancy and murder. In *Shobelt v. Barber*, [48] the husband murdered his wife and then agreed that under the law, he had no right to profit by the crime but asked that he be protected in rights he had prior to the crime. In other words, he asked that he be granted no new rights but only that his old ones be recognized. The High Court of Ontario finds no precedents and relies on other jurisprudence to conclude that the survivor in these circumstances is to be considered the owner of the fee but as a constructive trustee of that entire fee subject to a beneficial interest in himself for an undivided one-half and the balance he holds for the next of kin of his deceased wife. Time will determine the outcome of this ruling; one hopes it will be accepted.

[48] 60 D.L.R.2d 519 (Ont. High Ct. 1966).